CHAPTER 2

IMPLICATIONS OF RETAINING SECTION 160(D) OF THE BROADCASTING SERVICES ACT 1992

2.1 As long as section 160(d) of the *Broadcasting Services Act 1992* is retained in its present form, the Australian Broadcasting Authority (ABA) has little choice in the wake of the High Court's "Project Blue Sky" decision, but to devise a new Australian Content Standard to replace the one that had been found to be "unlawful". The ABA'c challenge is to accommodate Australia's international obligations as required by the provisions of the Act, while still attempting to support the cultural object set out in section 3(e) of the *BSA.* The latter requires free-to-air commercial TV channels to promote a sense of Australian identity, character and diversity.

The ABA's response: the draft new Australian Content Standard

2.2 The ABA met that challenge by first releasing a Discussion Paper canvassing various options in July 1998 and inviting comments on its proposals. This was followed by the release of the draft of its proposed new Australian Content Standard in November 1998. The most significant change in the new Standard is that 'Australian program' is replaced throughout by 'Australian or New Zealand or Australian/New Zealand' program. An Australian program is one which satisfies the Australian creative elements test (ie certain personnel involved must be Australians); a New Zealand program is one which satisfies an identical New Zealand creative elements test; an Australian/New Zealand program is one whose personnel between them are Australians or New Zealanders.[1]

2.3 The ABA made other changes as a result of its consideration of the likely impact of including New Zealand programs.[2] They are -

- The subquota for first-release Australian documentaries is increased from 10 hours to 20 hours per year, 'in recognition of the vulnerability [to replacement by New Zealand programs] of the minimal 10 hour obligation under the current quota'. The ABA considered similar arguments in relation to the subquotas for drama and children's drama, but does not propose any change to these, as it regards the risks as less severe: '…it is premature to increase these subquotas for drama and children's drama at the introduction of a new standard.'[3]

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1 This is the effect though not the overt structure of the draft standard. The draft standard is structured to retain 'Australian' content as its default topic, but adds a section to the effect that New Zealand, Australian/New Zealand programs or Australian official co-productions can be used to reduce Australian content quota obligations.

2 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, p 3

3 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D p 7-9

- The 32 hour quota for first release Australian children's drama will only be satisfied by programs for which the licence fee is at least $45,000 per half hour. This prevents the quota from being filled by New Zealand programs sold at much cheaper prices in what (for New Zealand) is a secondary market. The requirement is proposed for children's drama '…where the ABA considers the argument for a minimum licence fee more compelling as the purchase of children's drama is more likely to be cost driven.' The ABA considered and rejected arguments for using minimum licence fees more widely.[4]

- The 'prime time' within which the quota for first release Australian drama must be shown is redefined from 5pm-midnight to 5pm-11pm. The reasons for this are not stated very explicitly in the ABA's November 1998 paper, but clearly reflect production industry concerns to prevent broadcasters from showing a cheap, low-rating New Zealand program late at night, when there are few viewers, to earn quota points.[5] Several submissions to this inquiry pointed out that '…if a network bought just one New Zealand strip drama and screened it five nights a week in a low ratings [ie late night] time slot, it would meet over half that network's adult drama obligations…'[6]

2.4 'First release' is redefined to exclude programs more than 18 months old (except feature films). This is to prevent New Zealand back catalogue from counting as first release in Australia.[7] Less directly but nevertheless of relevance to the issue under consideration was the following change:

- Eligibility under Division 10BA of the *Income Tax Assessment Act 1936* is removed. The ABA comments: '…in the event that 10BA is retained as a gateway, the equivalent New Zealand tax certification for qualifying programs would need to be included… [this] could result in differences in operation through the built-in discretion contained within each test. The ABA therefore proposes to remove the 10BA gateway from the revised standard.'[8]

2.5 Other proposed changes were not directly related to the Austalian/New Zealand content problem and are not discussed here since they are not directly relevant to the Committee's inquiry. .[9]

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4 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 10-12

5 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 12-13; also L Osborne (ABA), Evidence 4 December 1998 p 20

6 Media Entertainment and Arts Alliance, Submission no. 17 p 2

7 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 13-14

8 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 7

9 'First release' to include telemovies previously broadcast on pay TV; changed definition of 'documentary; changed definition of 'sketch comedy'; additional creative elements test for animated

2.6 Project Blue Sky's challenge of the current Australian Content Standard determined by the Australian Broadcasting Authority represented a challenge to the australian content quotas for the commercial television industry. Submissions to this inquiry recognised this as being the crucial issue.

Australian Content Quotas on Television

2.7 There was overwhelming support from submissions and witnesses to this inquiry for Australian content quotas. The majority of witnesses were adamant that quotas are essential for maintaining appropriate levels of Australian content for cultural purposes; in particular, for preventing Australian television from being dominated by imports from the United States. The Committee was told, for example:

> 'If you want to look at the history of Australian television, it is self-evident that there has been a direct increase in the level and, I would argue, the quality of Australian programming in line with regulation. It has been no accident that Australians now enjoy access to a diversity and quality of programming that would have been unimagined by my parents when television first came to this country… You need not look in the statute books to find out what the local content rules are in Fiji or Pakistan; you need only look at their television guides. If it is saturated with reruns of *I Love Lucy* and *McHales Navy*, you can bet your bottom dollar that the national government has not made a decision that it is important to regulate in the public interest for local content.'[10]

2.8 The ABA noted in its Discussion Paper that domestic content quotas for television have been adopted by most western countries. Most are of similar type, sharing the objective of 'promoting the enhancement of national culture by limiting the consumption of foreign programs… Invariably, over 50 per cent of the airtime is reserved for domestic programming.'[11] A noteworthy exception is the USA, but in that huge market practically all free-to-air television is under American creative control in any case.[12] Further information on overseas local content rules is in APPENDIX 1.

2.9 Consistent with the support for the quota system to maintain a genuinely 'australian" feel on the nation's television screens, the majority of submissions to this inquiry called for the Committee to recommend repeal of section 160(d) of the *Broadcasting Services Act 1992* to enable the ABA to pursue the cultural objective of the Act without constraints. Most felt that the object of the Act was irreconcilable with

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programs. Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 16-17

10 A Britton (Media Entertainment and Arts Alliance), Evidence 4 December 1998 p 5

11 Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1998, p 24, quoting F Papandrea, *Cultural Regulation of Australian Television Programs*, Bureau of Transport & Communications Economics Occasional Paper 114, 1997, Appendix 2, p 233

12 Department of Communications, Information Technology and the Arts, Submission no. 32 p 16

the provisions of section 160(d) and that together, they placed the ABA in "an impossible situation".[13] In the following section, the Committee examines first the implications of retaining section 160(d).

Industry Reaction to the new Draft Australian Content Standard

2.10 The majority of submissions to the Committee strongly rejected any approach, which would treat New Zealand programs as "australian" for the purposes of the australian content quotas. Witnesses appearing before the Committee at its public hearing (held after the release of the ABA's new Draft Australian Content Standard) reiterated their opposition to such an approach and many supported their stance in further written submissions to the Committee.

2.11 Notwithstanding the views of the High Court judges that the ABA can develop an Australian Content Standard that complies with section 122 of the *Broadcasting Services Act 1992* without breaching section 160(d), the majority of submissions to the Committee stated that that there is a fundamental tension between the cultural objective of the Act and the free trade objective of the CER Protocol. For example:

> 'SPAA [The Screen Producers Association of Australia] submits that there is a fundamental and irreconcilable conflict between the purpose of local content regulation to promote Australian cultural representation on television and the aims of trade liberalisation expressed in the Closer Economic Relations (CER) agreement…'[14]

> 'The ABA simply cannot determine a standard which achieves the cultural imperatives required of it under the Broadcasting Services Act, under the cloud of section 160(d).'[15]

2.12 The strong feelings which many objectors had against the draft standard and/or against paragraph 160(d) are clearly fuelled by what they see as the absurdity of defining an 'Australian' content standard to include New Zealand programs.

> '…It cannot really be called an Australian content standard at all. I think the Australian Broadcasting Authority might run foul of the Trade Practices Act under the misleading and deceptive conduct provisions, because this is an Australian and New Zealand content standard… You may as well call a spade a spade rather than continuing to call it an Australian content standard.'[16]

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13 Australian Children's Television Foundation, Submission to ABA review, 3 September 1998

14 Screen Producers Association of Australia, Submission no. 22 p 112

15 Australian Children's Television Foundation, Submission no. 23 p 144

16 G Masterman, Evidence 4 December 1998 p 26

Any other changes to the standard?

2.13 The ABA, in forming the draft revised Australian Content Standard, considered and rejected a number of options, including: separate quotas for New Zealand programs; increased subquotas (but it does propose an increase for documentaries only); an 'on-screen' ('Australian look') test; minimum expenditure requirements; limits on subsidised programs; a first release *in Australia* requirement; a market attachment requirement. These were rejected either because they are impractical, or because, aiming to exclude New Zealand programs in practice, they might offend Article 8 of the CER Protocol (which prohibits 'disguised restrictions' on trade); or because the ABA considers that the mischief they aim to avert is not certain enough to warrant the action 'at this stage'.

2.14 The last point applies particularly to the possibility of increasing the subquotas, as some submissions suggested, to make room for New Zealand programs without reducing Australian programs. The ABA thinks that '…it is premature to increase these subquotas for drama and children's drama at the introduction of a new standard', using words that imply further monitoring and review in due course.[17]

2.15 The Screen Producers and Directors Association of New Zealand, by way of reassurance to the Australian production industry, proposed a phased-in ceiling on NZ programs in quota time.[18] The ABA has not followed this up as it thinks the proposal has 'significant practical and operational difficulties' and is not CER-compliant.[19]

2.16 This Committee does not propose to duplicate the ABA's consideration of these matters. The committee is satisfied that that ABA has done its best to make a draft standard that reconciles the cultural objective and the CER Protocol *within the constraints* of the present *BSA* and the High Court judgment. There is no magic solution yet undiscovered, to this problem. If 160 (d) is retained in its present form and the new ABA Standard implemented, it is only after the new Standard has been in operation for some time that its effectiveness in reconciling the cultural objective and the requirements of the CER Protocol could be measured.

Fears of an influx of New Zealand programs

2.17 One of the chief matters of concern expressed in evidence was the likely result, in practice, of admitting New Zealand programs to Australian content quotas. How much Australian content quota time will be taken up by New Zealand programs?

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17 This point applies particularly to proposals to increase the subquotas. Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 8-9

18 Screen Producers and Directors Association [NZ], Submission no. 12 p46; J Tyndall (SPADA), Evidence 4 December 1998 p 29

19 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 10. See also Screen Producers Association of Australia, Submission no. 22a p 2

2.18 In general the Australian production industry and related interest groups stressed the traditional structure of the TV production industry with its practice of marginal pricing making for cheap prices in secondary markets. They fear that broadcasters will take up significant quantities of presumably cheaper New Zealand programs, replacing Australian programs in quota time, to the detriment of the cultural objective of the Australian Content Standard.

2.19 Concerns about replacement by New Zealand programs were chiefly focussed on the three subquota types: first release adult drama, first release documentaries, and children's programming (particularly children's drama). These are considered further below. Other program types, which make up the balance of the 55 per cent Australian content quota include news, current affairs, sport, infotainment, lifestyle and light entertainment programs. The ABA believes that these, being mostly local or ephemeral in character, are less vulnerable to replacement,[20] and the silence of most submissions on this suggests wide agreement, though the Australian Film Commission does caution:

> 'It is also very significant that Ten Network just met the overall transmission requirement in 1997 and 1996 [ie unlike the other networks, which overfilled the quota - see APPENDIX 3]. It has generally been believed that the areas which make up the balance of the transmission quota, news and current affairs, sport, infortainment and light entertainment, are less vulnerable to displacement by important programming… However, the Ten Network transmission results indicate this may need reassessing.[21]

2.20 To the general arguments about possible replacement by cheap imports, the Federation of Australian Commercial Television Stations (FACTS) and/or the New Zealand production industry made several answers. They stressed that historically New Zealand programs have not rated well with Australian viewers. They argue that this is a more important factor than licence fees.

> 'Programs made for the New Zealand market have to date had very little impact in Australia…. that will not change if such programs become eligible for the Australian quota. Broadcasters will continue to look for broad audience appeal in programs, even more than cost-effectiveness, and there seem to be no grounds for believing that programs made for the New Zealand market will become more attractive to Australian viewers.'[22]

2.21 FACTS pointed out that most Australian networks overfill most of their quotas, and spend much more on quota-satisfying programming than the quotas demand. The argument is that this proves that audience appeal is the more important

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20 Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1988, p 24-25

21 Australian Film Commission & others, Submission to ABA's review of the Australian Content Standard, 1998, p 14

22 Federation of Australian Commercial Television Stations, Submission no. 25 p155

thing, and that the networks are *not* driven by a search for cheap 'quota quickies' that New Zealand might supply.

> 'Australian commercial broadcasters spend over $800 million a year on local programming… They deliberately choose to commission quite an amount of expensive drama. They could obviously meet their quota requirements with fairly cheap serials. They choose not to because it is essentially a market driven broadcasting sector… The great bulk of the work Australian broadcasters do in the way of [supporting] local production is not quota driven.'[23]

Details of the networks' compliance with the quotas are in APPENDIX 3.

2.22 SPADA-NZ and FACTS stressed the small size of the New Zealand production industry compared with the Australian production industry, and the fact that only a small proportion of its product (certainly, only a small proportion of its government subsidised product) is sold outside New Zealand.[24] The implication is that even if Australian broadcasters were minded to buy New Zealand programs, there would be little suitable product available. In FACTS's view:

> 'There is only a small amount of New Zealand programming relevant to the subquotas. That comprises 410 hour of children's programming (but no children's drama), 189 hours of documentaries (of generally parochial interest only) and approximately 150 hours of [adult] drama per annum.'[25]

2.23 Screen Producers and Directors Association of New Zealand (SPDANZ) pointed out that… 'Australian dramas, serials and format programs have established a significant market share and audience acceptance within New Zealand. The same is far from true in reverse, with a combination of local content regulations and cheap, less risky (from a ratings perspective) US and British programs, combining to keep New Zealand programs effectively out of the market. Between 500 and 600 hours of Australian programs are screened on New Zealand free-to-air television per year. This compares with around 20 hours of New Zealand programming broadcast annually on Australian television.'[26]

2.24 The Committee was not convinced by the arguments put forward by SPADANZ in relation to this last point: Whether New Zealand programs are

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23 T Branigan (FACTS), Evidence 4 December 1998 p32; see also FACTS, Submission no. 25 Attachment (submission to ABA September 1998) p 4. See APPENDIX 3, for figures on the networks' compliance with the quotas. The main areas where there is only bare compliance are: all networks for first release children's drama quota; also Ten Network for general transmission quota and documentary quota.

24 Screen Producers and Directors Association [NZ], Submission no. 12, p 41, 44 & FACTS, Submission no. 25, p 6

25 Federation of Australian Commercial Television Stations, Submission no.25 Attachment (Submission to ABA September 1998) p 6

26 Screen Producers and Directors Association [NZ], Submission no. 12 p 42

competitive against US and British programs outside quota time says little about whether they will be competitive against Australian programs within quota time.

2.25 It seems inconsistent for SPDANZ to point to the present imbalance in trade in support of including New Zealand programs in an Australian Content Standard while simultaneously giving reassurances that there will probably not be much change to what is broadcast on Australian TV screens. As a matter of cultural policy, if New Zealanders see a problem in the amount of Australian programming on New Zealand TV, that is an issue for their government to consider. It has no bearing on the Committee's deliberations in the Australia's cultural policy.

2.26 The Committee notes here the argument of the Australian production industry that since New Zealand does not have local content quotas, 'there is no reciprocity'. That is, Australian programs in New Zealand, since they must compete against the rest of the world, are disadvantaged relative to New Zealand programs in Australian quota time, which will need to compete only against Australia.[27] It was suggested that:

> 'Interestingly, the New Zealand case is not for complete free trade in television programs. If that were so they would have joined the mainly American push against all forms of local content regulation. The New Zealand argument is not for open competition with all suppliers of programs to the Australian domestic market. Instead they seek to have equality of advantage with Australian programs producers in Australia.'[28]

Effect of including New Zealand Programs on the Subquotas

2.27 The inquiry revealed widespread fear in the Australian film production industry that the inclusion of New Zealand made programs for the purpose of meeting the "australian content" quotas as required in the ABA's Standard would have a major negative effect on the australian industry. Many submissions argued that some subquota types are particularly vulnerable to replacement. They are: first release Australian drama, documentaries and children's drama. [29] Submissions pointed out that programs of these types comprise less than three per cent of total commercial broadcast hours.[30] The Australian Film Commission said that:

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27 Media Entertainment & Arts Alliance, Submission no.17 p88; Australian Film Commission, Submission no. 29 p 230

28 Screen Producers Association of Australia, Submission no. 22 p 126-7

29 There was some confusion in evidence between children's *programming* and children's *drama*. The networks must show 130 hours per year of Australian children's programs of which 32 hours must be first release Australian children's drama.

30 For example, Media Entertainment and Arts Alliance, Submission no. 17 p 86; Australian Screen Directors Association Ltd, Submission no. 27 p 170.

> The [first release Australian] 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 per cent of all programming.[31]

2.28 The inference from such statements is clearly that these subquotas are so small that they should be jealously guarded. In response FACTS argued that to express the subquotas as percentages in this way is scarcely relevant:

> 'What this [the 1.9 per cent just quoted] presumably means is that first-release Australian drama (which by definition is scheduled between 6.00pm and midnight) comprises 1.9 per cent of first release and repeat hours scheduled by stations from 6.00am to midnight. That is clearly a meaningless figure, as it confuses quite different categories and time periods. As a proportion of all first-run prime-time programming, Australian drama is more like 15 per cent.'[32]

2.29 The ABA's subquotas currently amount to about 3 per cent of total broadcast time. The Committee considers that arguments about percentages are not directly relevant here since this is not an inquiry about whether 3 per cent is a good figure. This question for this inquiry is what *proportion* of the 3 per cent is vulnerable to replacement by New Zealand programs. Similarly (recalling the arguments of the New Zealand production industry in the previous section), whether the New Zealand production industry is smaller than the Australian production industry is beside the point. The question for this inquiry is whether the New Zealand industry, small though it may be, is well positioned to replace a significant *proportion* of the 3 per cent of broadcast time.

2.30 The actual hours of New Zealand production, and Australian broadcasting, in the three subquota categories, can be seen in APPENDICES 3 and 4.

First release Australian drama

2.31 In 1997 336 hours of New Zealand made drama/comedy were broadcast in New Zealand, of which 170 hours were first release. 62 hours of drama/comedy production were subsidised by New Zealand on Air, the New Zealand government funding body. The Australian content quota is between 80 and 258 hours per year (depending on the mix of program types chosen to make up 225 points), and the networks broadcast, on average, 168 hours.[33] See APPENDICES 3, 4 and 6.

2.32 Several submissions pointed out that:

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31 Australian Film Commission, Submission no. 29 p 220

32 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (FACTS Submission to ABA 21 October 1998), p 6

33 Australian Film Commission, Submission no. 29 p 220

> …If a network bought just one New Zealand strip drama and screened it five nights a week in a low ratings time slot, it would meet over half that network's adult drama obligations…[34]

2.33 FACTS rejected that argument on the basis that New Zealand drama is not likely to be appealing to the networks:

> '…programs like *Shortland Street* already have equivalents in Australia, eg *Breakers, Pacific Drive, Heartbreak High*, where it can be argued that Australia is a secondary market and, as a result, the cost of such programming is already moderate compared to international product. Networks are not going to take the additional risk of scheduling New Zealand programs such as these (with lower production values, and containing New Zealand-specific language and issues) in order to save very little.'[35]

2.34 FACTS also stressed the networks' voluntary expenditure on quality Australian drama, and the fact that they overfill the quota, to show that they are not in search of 'quota quickies':

> 'If programming decisions were made purely on cost, there would be a very different line-up of programming on Australian television, including much more lower-cost Australian drama. What current schedules demonstrate is that cost is only one factor.'[36]

2.35 In answer to this the Australian production industry pointed out that the networks' expenditure on and broadcasting of Australian drama has declined in recent years. According to the Australian Film Commission (AFC), from 1995/96 to 1996/7 the networks' expenditure on Australian drama has declined by 4.4% while their expenditure on foreign drama has increased by 14.6%; and hours of Australian drama broadcast have declined from 195 in 1993 to 168 in 1997.[37] The AFC quotes with approval a September 1995 ABA report that '…there has been a steady decline in expenditure on Australian drama since 1990.'[38]

2.36 FACTS's response is that these figures are not what they seem, partly for various technical reasons to do with changed data-gathering and accounting methods; partly because -

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34 Media Entertainment and Arts Alliance, Submission no.17 p 73 (for example)

35 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (submission to ABA September 1998) p 6

36 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA September 1998) p 7

37 Australian Film Commission, Submission no. 29 p 223

38 Australian Film Commission, submission to ABA review 1998, p 15, ABA, *Australian Content - review of the program standard for commercial television,* September 1995, p 33

> 'Nowadays, overseas sales of these programs mean that the Australian broadcast licence fees can be considerably less than 100 per cent of the production cost… This means that broadcasters may be able to secure the Australian drama inventory they wish to schedule more economically than they could in past years… Taken as a whole, there is no doubt that Australian drama in 1998 is of significantly higher quality than it was in the late 1980s.'[39]

2.37 The ABA, in deliberating on the draft standard, considered and rejected proposals to increase the adult drama subquota to compensate for the risk of replacement. Its reasoning echoes the argument of FACTS -

> 'Historical evidence indicates that drama produced in New Zealand and shown in Australia does not perform well, and is therefore not a viable or attractive option for Australian networks at this stage…'[40]

2.38 Many in the Australian production industry remain sceptical that the changes will not have a dramatic effect on the number of programs made in Australia (or New Zealand) that would be broadcast to fill the subquotas:

> 'I do not accept the proposition that New Zealand programs are somehow so inherently poor that they will not be well received in our markets… We should not be allowed to take any comfort from that argument.'[41]

2.39 The ABA does propose to cut back the quota-defining 'prime time' from 5pm-midnight to 5pm-11pm to limit the possibility of screening a cheap import late at night to gain quota points. This, however, has its downside, admitted by both FACTS and the Australian production industry: it limits a network's ability to test a new program or to play out an unsuccessful one, outside prime time (that is, outside the *real* prime time mid-evening). This… 'will force networks to become far more conservative in their development [of new Australian drama] and far less willing to take risks in the commissioning of new programs'.[42] FACTS uses this point to argue against truncating 'prime time'; the Australian production industry mentions it, implicitly, to reinforce their general position that the ABA, in the new Standard, is being asked to do the impossible. The Australian Writers' Guild also claims that should a network wish to screen a 'quota quickie', the 5-6pm 'shoulder' period is still available.[43]

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39 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA, 21 October 1998), p 6

40 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard,* November 1998, Attachment D p 8

41 A Britton (Media, Entertainment and Arts Alliance), Evidence 4 December 1998 p 20

42 Australian Film Finance Corporation Ltd, Submission no. 31 p 288; Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA, September 1998) p 14

43 S McCreadie (Australian Writers' Guild), Evidence 4 December 1998 p 19;

First release Australian documentaries

2.40 In 1997 269 hours of New Zealand made documentaries were broadcast in New Zealand, of which 189 hours were first release. 99 hours of documentary production were subsidised by New Zealand on Air. The Australian content quota is 10 hours of first release Australian documentaries per year, and the networks broadcast about 35 hours on average (7 Network), 23-27 hours (9 Network) and 10.5 hours (10 Network). See APPENDICES 3, 4 and 6.

2.41 According to Film Australia, documentaries are particularly vulnerable to replacement:

> '…high quantities of documentaries in the travel and adventure, and wildlife areas are produced in New Zealand each year. In the 1996-97 year, 269 hours of local documentary were broadcast on New Zealand commercial television and 89 documentaries were produced for $NZ27.6m… Of this expenditure, government subsidy contributed $NZ 12.2m, with New Zealand On Air the largest investor contributing $NZ 9.7m towards 99 hours of documentary production… It is obvious from these figures that the documentary sub-quota is extremely vulnerable to displacement by New Zealand documentary programming. The amount of documentary screened could fill the Australian content quota for each commercial network 20 times over; the amount subsidised could fill the current quota almost 10 times.'[44]

2.42 On the other hand, FACTS describes New Zealand documentaries as 'of generally parochial interest only'[45] and the Screen Producers and Directors Association [NZ] stresses the small overseas sales of New Zealand documentaries:

> 'Over the last nine years, an average of 12 hours of documentary programming have been sold internationally per year. This is the equivalent of around 10 per cent of total documentary hours funded [by New Zealand On Air].'[46]

2.43 The contrast between the different points of views highlight the difficulty in extrapolating from what *is* currently the case (12 hours per year of New Zealand documentaries sold overseas) to predict what *might* be in an uncertain future for which there is no precedent (99-269 hours of New Zealand documentaries potentially available to fill Australian quota time[47]).

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44 Film Australia, Submission no. 34 p 6

45 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA September 1998) p 6

46 Screen Producers and Directors Association [NZ], Submission no. 12 p 44

47 Note that the 269 hours *broadcast* in 1996-97 includes repeats, much of which would presumably be excluded from Australian quota by the proposed 18 month rule.

2.44 FACTS argues incidentally that, since most stations overfill their documentary quota in any case, the documentary quota serves no good purpose and should be abolished.[48] Film Australia regrets what it calls the networks' lack of commitment to documentaries other than travel, adventure and wildlife; quotes evidence suggesting 'a substantial unmet demand for Australian documentaries'; and sees the quota as a longer term investment in encouraging the networks to take risks with a wider variety of documentary material '…in much the same way their programming decisions in the drama area have met with much success (even though they may have been sceptical at the outset'.[49]

2.45 The ABA acknowledges the vulnerability of Australian documentaries, and proposes to increase the documentary subquota from 10 to 20 hours '…to serve as a safety net for Australian documentaries'.[50] Film Australia welcomes this but regards it as an inadequate response to the real nature of the problem:

> 'An extra 10 hours per year - given that two of the three networks are already screening that amount - of quota material will make no impact on the attractiveness of New Zealand programming…'[51]

Children's programs

2.46 In 1997 806 hours of New Zealand-made children's programs were broadcast in New Zealand, of which 366 hours were first release. 410 hours of children's programs were subsidised by New Zealand on Air. The Australian content quota for first release Australian children's programs is 130 hours per year, and the networks each broadcast 130-135 hours. See APPENDICES 3, 4 and 6.

2.47 Children's programming generally should be distinguished from children's drama. The Australian Children's Television Foundation had concerns about possible replacement of children's programs generally, based on the proportions of the above figures:

> '…the New Zealand production industry is easily capable of producing enough programming to meet our entire children's programming quota for each of the three commercial broadcasters.'[52]

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48 T Branigan (FACTS), Evidence 4 December 1998 p 31

49 Film Australia, Submission no. 34 p 4-5: '[The networks] are not convinced that other types of documentary programs - which often have cultural, historical, political or artistic issues as their central concerns - are popular with audiences… The unmet demand for locally produced factual programs extends to the nation's schools and universities where there is a serious shortage of local audio-visual content for educational use… over time networks could be convinced of audiences' desire for more documentary product and to take risks with the material…' See also R Harris (Australian Screen Directors Association), Evidence 4 December 1998 p 31

50 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 9

51 Film Australia, Submission no. 34 p 7

2.48 The ABA told the Committee that,'…most other New Zealand children's programming would not meet the ABA C [children's] and P [pre-school] classification standards.'[53] While the New Zealand industry commented:

> 'New Zealand on Air has supported the production of children's programming, as distinct from children's drama, in significant hours. However, a very significant proportion of that is magazine studio-based shows which have a very short shelf life and no life outside New Zealand. An average of nine hours per year, or 2.5 per cent of the total hours funded for children's programming, has been sold outside New Zealand in the course of the last 10 years.'[54]

2.49 A substantial number of submissions used the example of children's drama. The Australian content quota for first release children's drama is 32 hours per year (28 hours in 1997), and all the networks only just meet it (see APPENDIX 3). It is generally admitted that children's drama, being unattractive to advertisers, is quota-driven. This would make replacement by cheaper imports attractive.

> '[Children's] Programming prior to the introduction of the standard was price driven and if the option to acquire cheaper programming and still fulfil the requirements of an 'Australian' content standard emerges, it is difficult to see that price will not again become the major determinant in the purchase of programs… If one Australian network chose to screen half an hour a week of New Zealand children's drama it would meet 80 per cent of its quota requirement.'[55]

2.50 To allay these concerns FACTS pointed out that '…networks already have well-developed plans or commitments with Australian producers which are sufficient to meet their 'C' [children's] drama requirements for the next three years'.[56] The NZ production industry stressed that '…no children's drama programs have been made in New Zealand in last six or seven years', and does not foresee any change to that trend:

> 'In an environment in New Zealand where there is a steadily eroding amount of domestic fudging available to finance local productions, and also in an environment where there is no disposition on the part of New Zealand broadcasters to commission children's drama, I do not see that that situation is going to improve in the medium term.'[57]

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52 Australian Children's Television Foundation, Submission no. 23 p 139-140

53 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 8

54 J Tyndall (Screen Producers and Directors Association [NZ]), Evidence 4 December 1998 p 33

55 Media Entertainment and Arts Alliance, Submission no. 17 p 73, 77-78

56 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA September 1998), p 6

57 J Tyndall (Screen Producers and Directors Association [NZ]), Evidence 4 December 1998 p 32

2.51 The Australian production industry is not reassured. The Australian Children's Television Foundation queried the New Zealand definition of 'children's drama':

> 'NZ On Air's Annual Report for that year [1996/97]… does not indicate what would qualify as 'drama' programming. One of the programs funded last year by NZ On Air was a computer-animated series entitled *Squirt*. This 25 episode series could well be classified as drama under the current criteria in the Australian Standard.'[58]

2.52 The Australian Film Finance Corporation, acknowledging that '…New Zealand producers are not currently making large amounts of children's drama programs', perceived a risk of replacement 'at least in the medium term.'[59] The implication is that New Zealand producers might start producing for the Australian quota market.

2.53 The Committee is particularly concerned about the likely effect on children's drama and documentaries of admitting New Zealand programs as part of the subquota. It notes the submission of the Western Australian Chapter of the Screen Producers Association of Australia who stated:

> In Western Australia these two activities (children's drama and documentaries) represent the foundation of the industry. In fact, apart from the occasional telemovie or feature film we produce little else but C classification children's drama and documentaries. It has taken 16 years to build the reputation and output of these two areas to a point where we now have national and international markets… Our industry would suffer a very severe setback if section 160 (d) is not repealed… While not underestimating the effect on the industry generally I believe the impact on regional industry would be catastrophic.[60]

2.54 On this issue, the ABA comments: 'If programs were produced to meet the standard, the costs would approach those of locally [Australian] produced programs.'[61] In other words, a New Zealand program produced for the Australian market would have to recoup its costs in the Australian market (or at least, in the joint Australia/ New Zealand market): it would have to compete with Australian programs on its merits, without the advantage of secondary pricing.

2.55 The ABA does propose, as a 'safety net', to institute a minimum licence fee of $45,000 per half hour for first release children's drama programs to satisfy the quota:

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58 Australian Children's Television Foundation, Submission no. 23 p 139

59 Australian Film Finance Corporation, Submission no. 31 p 287

60 Screen Producers Association of Australia, Western Australia Chapter, Submission no.37, p 1

61 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 8

'The modest amount of children's drama required each year is a further reason to ensure that it is not subject to substitution due to price cutting.'[62]

Problem of subsidies to New Zealand TV programs

2.56 An argument relevant to all the vulnerable types of programs is that New Zealand programs will have an unfair advantage because they are said to be more widely or more highly subsidised by government than the equivalent Australian programs.

> 'A significant proportion of the New Zealand programs are produced with Government subsidy from New Zealand On Air whereas in Australia less than 2 per cent of programs currently qualifying as Australian content are in receipt of any subsidy.'[63]

2.57 In 1996/97 NZ On Air funded 62 hours of drama, 99 hours of documentary, and 410 hours of children's programs, and for the subsidised programs the subsidies represented between 55 and 80 per cent of production costs (see APPENDICES 6 and 7). According to the Australian Film Commission:

> 'Subsidy through NZ On Air 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… Subsidy is also available for general children's programming, an area not subsidised in Australia.'[64]

> '…in Australia, federal subsidy through the Australian Film Finance Corporation (FFC) is only available for adult drama programming for miniseries (up to 8 hours) and telemovies. State funding bodies provide some support for series in development and production but this is a small proportion of overall production costs…. Large amounts of documentary programming are both broadcast in New Zealand and supported by NZOA. This contrasts with Australia where the documentary production that is subsidised through the FFC and other bodies such as Film Australia rarely makes its way onto commercial television… It is evidence that documentary is more popular and better supported by New Zealand television than it is by commercial television in Australia.'[65]

2.58 The Australian Children's Television Foundation saw a risk that '…Australian commercial broadcasters would be encouraged to commission the production of children's programs from New Zealand producers, who are able to access NZ On Air funds, and thus be able to provide programming at a much cheaper

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62 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D p 12

63 Media Entertainment and Art Alliance, Submission no.17 p 73

64 Australian Film Commission, Submission no.29 p 234-5

65 Australian Film Commission and others, Submission to ABA review, 1998, p 20

cost to the Australian commercial networks than new Australian programs would involve.'[66]

2.59 In reply the Screen Producers and Directors Association (SPADA) [NZ] pointed out that '…the New Zealand On Air subsidy system is the only form of protection or support for the production industry in New Zealand…. By contrast, Australia has a combination of policy mechanisms, including public service broadcasting (ABC and SBS), direct government subsidy (AFFC, CTVF and state level funding) and local content regulation.' According to SPADA, the consequence of this broader public service role of New Zealand On Air is that few of the programs it supports are made with any thought of international sale:

> 'Over the last nine years, an average of 12 hours of documentary programming have been sold internationally per year. This is the equivalent of around 10 per cent of total documentary hours funded. An average of 9 hours per year (or 2.5% of total hours funded) of children's programming has been sold outside New Zealand.'[67]

2.60 SPADANZ also argues: 'The funding history of a program has no relevance to the price at which it might be sold. The fact that there are differing subsidy and support arrangements amongst the member states of the European Union has not been considered relevant in drawing up the provisions for unrestricted intra-European trade in television programs.'[68]

2.61 According to the ABA:

> 'The differences in the types of programs subsidised and the preconditions associated with programs qualifying for subsidy assistance make it difficult to compare the levels of subsidy provided in Australia and New Zealand… However, with the exception of children's programs, it appears that levels of subsidy as a percentage of production costs are roughly similar.'[69]

Longer term effects

2.62 There was an undercurrent in submissions by the Australian production industry to the effect that even if the short term risks of the new standard seem small, the longer term risks should not be underestimated. There are several issues here:

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66 Australian Children's Television Foundation, Submission no. 23 p 140

67 Screen Producers and Directors Association [NZ], Submission no.12 p 44

68 Screen Producers and Directors Association [NZ], Submission no.12 p 45

69 ABA, *Review of the Australian Content Standard - Discussion Paper,* July 1998, p 43

- A fear that Australian networks would be tempted to replace Australian with New Zealand programs, if not at once, then at the time when a popular series ends and the high start up costs of commissioning a new one must be faced.[70]

- A fear that the New Zealand industry, helped by government subsidies, could gear itself up to produce for the Australian market:

> '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 nothing that the last few years have 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. 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."'[71]

- The perceived 'medium term risk' to children's drama mentioned earlier (paragraph 2.52, even though no children's drama is now produced in New Zealand) contains the same idea.[72] A related idea is that Australian producers would be encouraged to work in New Zealand, '…draining our local industry of talent and resources.'[73]

- A fear that broadcasters, even where they do not actually use New Zealand imports, will use the threat of New Zealand imports as leverage to force down licence fees for Australian programs generally.[74]

- As a logical extension of the previous point: a fear that a single market in TV production will lead to reduced licence fees in both countries and reduced production in the two countries in total:

> 'If one drama series will do for both Australia and New Zealand, why would two be made, one for each country?'[75]

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70 For example, Australian Film Commission, Submission no.29 p 232; S McCreadie (Australian Writers'Guild), Evidence 4 December 1998 p 19

71 Australian Film Commission, Submission no. 29 p 232, quoting Project Blue Sky, *The Six Key Goals*, Project Blue Sky background paper.

72 Australian Film Finance Corporation, Submission no. 31 p 287

73 Australian Children's Television Foundation, Submission no. 23 p 140

74 For example, R Harris (Australian Screen Directors Association), Evidence 4 December 1998 p 28

75 Australian Film Commission, Submission no.29 p239-40 quoting K Hunter (New Zealand Screen Writers Guild); also K Ireland (Australian Film Commission), evidence 4 December 1998 p 32 See also T Branigan (FACTS), evidence 4 December 1998 p 30: in proportion as a New Zealand program has Australian sales, one would expect the New Zealand broadcaster to bargain down the New Zealand licence fee, forcing the producer to seek more than marginal cost recovery in the Australian licence fee. Mr Branigan made this point to argue that the discrepancy between primary and secondary prices can be

2.63 For the Australian production industry, it is irrelevant whether the future proves that their fears were unfounded: the lack of certainty is in itself a chief objection:

> 'The potential changes to the Standard ensure there is no longer ANY certainty about minimum levels of Australian programs that might be broadcast. Thus, providing no level of certainty to the Australian production sector about future base levels for independent program production.'[76]

> 'This is a highly volatile, difficult industry. The margins are getting slimmer, particularly with the introduction of digital technology and with new players coming on the market… For anyone to leave this room thinking that in the future there is not a significant chance that high cost Australian programming may be displaced by New Zealand programming which is looking to pick up its secondary market - much of which is heavily subsidised by the New Zealand government - is extremely naïve.'[77]

Committee comment

2.64 If, as a result of the new Standard, New Zealand producers decide to produce for Australia *as their primary market*, they will not be able to sell in Australia at secondary prices. [78] However the Committee recognises that there is a possibility that they could compete with the Australian produced programs at primary prices, and that this would have implications for the cultural objective of the Australian Content Standard.

2.65 The Committee is sympathetic to the concerns of the Australian production industry and related groups in the broadcasting and film industries about the possible negative effects of New Zealand programs on Australian programs within the australian content quotas. The major difficulty facing the Committee in this debate is the fact that the anticipated negative effects from the ABA's new Australian Content Standard are merely speculative. The Committee agrees with the Department of Communications, Information Technology and the Arts that there is no way of knowing how the situation will develop.[79]

2.66 The Committee notes that the ABA is committed to monitor and review the situation in two years 'to assess how well the standard is achieving its cultural

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less than is sometimes claimed; but the point also relates to possible reduced licence fees in a single market.

76 Australian Film Finance Corporation Ltd, Submission no.31 p 293

77 A Britton (Media Entertainment and Arts Alliance), Evidence 4 December 1998 p 30

78 T Branigan (FACTS), Evidence 4 December 1998 p 30

79 DOCITA, Submission no.32, p.6

purpose'.[80] Should the ABA's new Standard be implemented the Committee recommends a close monitoring of the situation.

2.67 The Committee is also concerned that the approach that the ABA has taken in devising its new Australian Content Standard within the constraints of section 160(d) of the *Broadcasting Services Act 1992* might give the erroneous impression that, in the ABA's view, Australian culture and New Zealand culture are one and the same and are interchangeable. Accordingly,

Recommendation 1

The Committee recommends that the Australian Broadcasting Authority (ABA) state in the introduction to its new Australian Content Standard that Australian culture and New Zealand culture are different from each other. They each have their own distinct characteristics and are not interchangeable. The ABA must make it clear that if the new Australian Content Standard gives special status to New Zealand productions the aim is solely to make the Standard consistent with Australia's obligations under the CER Protocol.

Recommendation 2

The Committee recommends that, in the event of the ABA's new Australian Content Standard being implemented, its effects on the number of New Zealand programs broadcast as part of various television quotas should be closely monitored by the ABA, with a view to taking remedial action if the ABA finds that object 3 (e) of the *Broadcasting Services Act 1992* is no longer being met. The ABA should report to the Minister after 2 years of operation of any new Standard.

International Implications of Retaining 160(d)

2.68 A number of submissions expressed the fear that if paragraph 160(d) of the *BSA* were retained in its present form, other nations who have treaties with Australia which include 'no less favoured treatment' clauses, would seek the same favoured treatment accorded to New Zealand under the "australian content" quotas for commercial television. Others argued that in its present form, the CER sets a precedent that will weaken Australia's bargaining position in negotiating for a cultural carveout in future trade agreements.

80 ABA, *Review of the Australian Content Standard - Proposed Standard*, November 1998, p 4

Possible 'no less favoured treatment' obligations to other nations

2.69 Of particular concern in some submissions, were the Basic Treaty of Friendship and Co-operation between Australia and Japan (the Nara Treaty: Australian Treaty Series 1977 no. 19) and the OECD Code of Liberalisation of Current Invisible Operations (Australian Treaty Series 1971 no. 11).

2.70 The Nara Treaty requires the parties to give each other treatment which is 'not discriminatory between nationals of the other Contracting Party and nationals of any third country' (Article 9). The fear is that Japan could demand access to Australian television no less favourable than New Zealand. The Australian Film Commission argued that this scenario could eventuate because:

> 'Japan has a thriving children's animated program industry and a number of such programs have been shown on Australian television. Animated programs are already dubbed… so redubbing in English does not have the same difficulties from the audience point of view that dubbing drama has.'[81]

2.71 The OECD Code requires members to liberalise trade in certain listed 'invisible operations', which include importation of recordings for television broadcast (Articles 1 & 2; Annex A). Within this positive list (Annex A) reservations (ie negative lists: Annex B) are allowed, and Australia has reserved 'time-quota limitations on the television screening of programs which are not of Australian origin.' However, a different article of the Code demands that members shall not discriminate between other members in liberalisation of the matters in the positive list (Article 9). Some argue that *this* article makes no allowance for a negative list, and accordingly any OECD Code signatory could demand equal treatment with New Zealand in the matter of importation of recordings for television broadcast.[82]

2.72 In its submission to the Committee, the Attorney General's Department stated that it believed these concerns to be unwarranted:

> 'We have considered whether there would be any flow-on effects… we have examined Australia's obligations under the following international trade instruments to which Australia is a party:
> • the OECD Code of Liberalisation of Current Invisible Operations ('the OECD Code') [ATS 1971 no. 11]
> • the Basic Treaty of Friendship and Co-operation between Australia and Japan [ATS 1977 no. 19]
> • the General Agreement on Trade in Services ('GATS') [ATS 1995, no. 8]; and
> • bilateral Investment Promotion and Protection Agreements ('IPPAs').
>
> 'There are good arguments Australia could rely upon against the application of these treaties through paragraph 160(d). For example, Australia has made express reservations under some of these agreements.

81 Australian Film Commission, Submission no.29 p 246

82 For example, Australian Film Commission, Submission no.29 p 244

> Australia has reserved 'time-quota limitations on the television screening of programs which are not of Australian origin' in relation to the OECD Code (article 2(b) Annex B) and the provision of television services does not form part of the Australian GATS offer.'[83]

2.73 The Committee accepts that there are 'good arguments' along those lines but the Committee notes that there are those who argue that the matter is not free from doubt. Some question whether Australia and New Zealand are a 'customs union' (which would remove the problem in respect of the OECD code).[84]

2.74 Submissions also mentioned the possibility that Australia has other relevant obligations unnoticed among the 900-odd treaties to which Australia is a party. In this context, the Committee notes the supplementary submission of the Australian Film Commission [85] in which it tendered legal advice on this issue, provided by Associate Professor Donald Rothwell of the University of Sydney.

2.75 The Attorney-General's Department suggested in its submission, that one option would be for paragraph 160(d) to be amended to "refer specifically to the CER Protocol": In AG's opinion,

> Such an amendment would also have the effect of excluding the operation of other treaties in the context of the formulation of broadcasting standards.[86]

2.76 The Department of Communications, Information Technology and the Arts suggested another option:

> One approach which could be considered as a way of assisting the ABA in the exercise of its regulatory responsibilities would be to amend s.160 (d) to mirror s.580 of the *Telecommunications Act 1997*, which requires the ACA to have regard to Australia's obligations under any convention of which the Minister has notified the ACA in writing. If an identical provision were to apply to the ABA, the Minister could notify the ABA either to have regard to the CER Services Protocol alone, or such additional treaties as the Minister considers relevant.

2.77 The Committee believes that the possibility of paragraph 160 (d) applying to other international treaties is not an issue that can remain unresolved. In the Committee's view, the issue is of such importance that it should be clarified through amendments to section 160(d). Accordingly,

Recommendation 3

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83 Attorney General's Department, Submission no.28 p 199

84 See Pryles M, Waincymer J & Davies M, *International Trade Law: Commentary & Materials*, 1996, p 877

85 Australian Film Commission, Submission no.29 (b)

86 Attorney-General's Department, Submission no.28 p 195

The Committee recommends that section 160(d) of the *Broadcasting Services Act 1992* be amended to require the ABA to perform its functions having regard to Australia's obligations under any convention of which the Minister has notified the ABA in writing.

Australia's bargaining position in future treaty negotiations

2.78 Several submissions fear that to allow New Zealand access to Australian content quotas will weaken Australia's bargaining position in arguing for 'cultural carveouts' in other treaty negotiations in future.

> 'In the Uruguay Round of negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT), now World Ttrade Organisation (WTO), Australia, like most countries, made no commitment to lieberalise assistance mechanisms in the audiovisual sector… Nonetheless, the USA will undoubtedly continue with its battle to reduce barriers in the next Round which is due to start again in the year 2000, because it clearly suits the interests of their industry. To compromise the Australian Content Standard by giving prominence to the CER would severely compromise the ability of Australia to maintain its position…'[87]

2.79 The Department of Foreign Affairs and Trade acknowledges that '…it is possible Australia will be asked by trading partners, and specifically the US, to remove or reduce the television local content quotas.'[88]

2.80 On the other hand the Screen Producers and Directors Association [NZ] believes that it is possible and desirable for Australia to ring-fence the CER - as a pre-existing agreement - without implications for other international trade and trade policy interests Australia might wish to pursue.[89] We note also the argument of the Australian Writers' Guild that:

> 'There is clearly an enormous level of precedent for treaties to contain cultural reservations… If the Australian government fails to resolve this issue and act decisively, rather than being respected in diplomatic circles we will be a laughing stock…Defending our right to regulate would not be regarded as unreasonable by our trading partners as the right to regulate in this area is internationally recognised….'[90]

2.81 This was part of an argument that the CER Protocol should be renegotiated to avoid creating a bad precedent. The committee affirms the importance of cultural

87 Australian Screen Directors Association Ltd, Submission no.27 p 179

88 Australian Film Commission, submission 29 p 247, quoting DFAT submission to ABA Local Content on Pay TV Inquiry, December 1996

89 Screen Producers and Directors Association [NZ], Submission no. 12 p 42. Similarly G Randal (New Zealand High Commission), Evidence 4 December 1998 p 25

90 Australian Writers' Guild, Submission no. 30 p 277,280

carveouts in free trade negotiations, and we expect that the Australian government will maintain that position.

Problem of New Zealand/ third party co-productions

2.82 The draft Australian Content Standards retains Australian official co-productions as a gateway to quota. Several submissions were concerned that New Zealand/ third party official co-productions could demand equal rights. According to the ABA, all except the New Zealand Government and the Screen Producers and Directors Association [NZ] agree with the ABA that New Zealand/ third party co-productions should be excluded.[91]

2.83 The New Zealand government, in its submission to the ABA review, argued that '…if a gateway is provided for Australian programmes made under the provisions of a co-production treaty, then the same criteria must apply to New Zealand programmes.'[92] SPADA [NZ] considers that New Zealand/ third party co-productions should be accepted '…but with acceptance that the benefits of the CER Agreement should not extend beyond the member states.'[93] It is not very clear how this proviso would work in practice.

2.84 FACTS considers that even if New Zealand/ third party co-productions are accepted… 'This is not likely to pose a problem of any practical significance, given the small number of co-productions involved.'[94] Others in the Australian production industry are more concerned. According to the Australian Film Commission:

> '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.'[95]

2.85 The Attorney-General's Department gave evidence to the Committee that in its view, the CER Protocol does not require equal treatment for New Zealand/ third party co-productions, since '…nothing that New Zealand does in an agreement or a treaty with a third country combines Australia.'[96] In a supplementary submission to the Committee, the Attorney-General's Department reiterated its advice that New Zealand-third party co-productions are not covered by the CER Services Protocol. This is the approach that has been adopted by the ABA and the new draft Australian

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91 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D p 7

92 Government of New Zealand, second Submission to ABA review, 1988, p 3

93 Screen Producers and Directors Association [NZ], Submission no. 12 p 46

94 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA, September 1998), p 10

95 Australian Film Commission, Submission no. 29 p 237

96 W Campbell (Attorney-General's Department), Evidence 4 December 1998 p 17 see also L Osborne (ABA), Evidence 4 December 1998 p 16

Content Standard excludes New Zealand/ third party co-productions. However, the ABA has indicated that it would be seeking a "side letter" [97] to the CER Protocol:

> The ABA has decided to retain official co-productions as a gateway by including them in the new part of the standard dealing with Australia's international obligations. The ABA will also be seeking a side letter to the CER protocol which excludes official New Zealand co-productions with countries other than Australia.[98]

See APPENDIX 10 for the Attorney General's Department advice on the issue of side letters.

2.86 The present position of the New Zealand government in relation to co-productions was put to the Committee thus:

> 'The view of the New Zealand government is simply that we are disappointed that New Zealand official co-productions will not be eligible for the quota.'[99]

2.87 In view of the level of concern in the industry revealed in submissions to the Committee and described in paragraphs 2.82 and 2.84, the Committee believes that every step should be taken to clarify the status of New Zealand/third party co-productions. Therefore,

Recommendation 4

The Committee recommends that on the question of New Zealand/third party co-productions, the government should negotiate with the New Zealand government with a view to exchanging side letters to the CER Services Protocol to clarify both countries' understanding of the meaning and application of the CER Services Protocol in relation to New Zealand/third party co-productions. The side letter should make it clear that New Zealand/third party co-productions would not be eligible for the purposes of the Australian Content Standard quotas.

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97 Note re "side letter": The Attorney General's Department advised the Committee thus: "It is not uncommon for letters (usually referred to as 'side letters' if done at the time of treaty adoption, signature or ratification) to be exchanged between countries to record a common understanding of the meaning and application of particular provisions of treaties, particularly bilateral treaties such as the CER Services Protocol. Attorney-General's Department, Supplementary Submission no. 28 (b)

98 Australian Broadcasting Authority, *Review of the Australia Content Standard, Proposed Standard,* November 1998, Attachment D, p. 7

99 G Randal (New Zealand High Commission), Evidence 4 December 1998 p 18