CHAPTER 3

IMPLICATIONS OF REPEALING PARAGRAPH 160(D) OF THE BROADCASTING SERVICES ACT 1992

Should paragraph 160(d) be repealed?

3.1 The majority of submissions called for section 160(d) to be repealed and some argued that there do not seem to be other provisions as 'sweeping' as paragraph 160(d) in Australian law.[1] The Attorney-General's Department refuted this argument, citing s65(2) of the *Great Barrier Reef Marine Park Act 1975*.[2] The High Court's judgment lists 14 other Acts or regulations that have provisions 'similar' to paragraph 160(d).[3]

3.2 The Attorney General's Department submitted to the Committee that:

> The repeal of paragraph 160 (d) would not, in itself, involve a breach of international law. However, such a repeal could lead to Australia being placed in breach of its international obligations–for example, if the standard held unlawful by the High Court was to be re-made. Moreover, its removal would not be consistent with a policy of ensuring that Australia remains in compliance with its international obligations. Any amendment to section 160(d) should continue to ensure that Australia remains in compliance with its treaty obligations.[4]

3.3 The Department of Foreign Affairs and Trade (DFAT) stressed that repealing paragraph 160(d), though it might remove the problem that the present Standard is unlawful in Australian law, would *not* remove the diplomatic problem that the present Standard is inconsistent with Australia's obligations under the CER Protocol with New Zealand:

> '…the general position under international law [is] that a country cannot invoke the provisions of its internal law, or the lack of such provisions, as justifications for its failure to perform a treaty.'[5]

3.4 In DFAT's view, to repeal the paragraph would send a signal that Australia was contemplating abrogating its international commitments. This would be detrimental to Australia's standing in the international community.[6]

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1 For example, Samara Films, Submission no. 9 p 68

2 Attorney-General's Department, Submission no. 28a p 1

3 *Project Blue Sky vs Australian Broadcasting Authority*, HCA 28 (28 April 1998), footnote 31

4 Attorney-General's Department, Submission no. 28a p 15

5 W Campbell (Attorney-General's Department), Evidence 4 December 1998, p 12

6 J Wise (Department of Foreign Affairs and Trade), Evidence 4 December 1998 p 12, 23

3.5 The New Zealand government submitted to the Committee:

> 'Any attempt to undermine Australia's CER obligations, and the High Court decision, would be greeted with considerable dismay in New Zealand, and by Australia's other friends in the international community.'[7]

3.6 The Committee agrees that Australia should abide by its international commitments. Accordingly, the Committee does not believe that repealing paragraph 160(d) would provide the optimum solution to the problem.

3.7 A Balance between Protecting Cultural Identity and the CER Protocol

3.8 It follows from the previous point that the only way to restore the ABA's freedom of action in relation to the Australian Content Standard, while being consistent with Australia's commitments under the CER Protocol, is to renegotiate the Protocol to include a cultural exemption. Several submissions advocated this approach.

3.9 FACTS for example told the Committee:

> 'It may prove to be the case that amendment to s.160(d), or renegotiation of relevant aspects of the CER, is the only practical way of ensuring that government policies in support of cultural objectives are not unacceptably constrained by the terms of the Services Protocol.'[8]

3.10 Some submissions argued that the lack of a cultural exemption when the CER Protocol was negotiated in 1988 was an honest mistake, which the government should now try to rectify:

> The fact is that when we entered into the trades and services protocol… there was very insufficient consultation with the industry and a misunderstanding of what we were signing up for… The government now realises how important it is to seek those exemptions… if one of the outcomes is to renegotiate the CER in order to make the removal of 160(d) consistent with our international obligations, then I think that is something which the government has to do.[9]

3.11 On the other hand the Department of Foreign Affairs and Trade, arguing that there is no need to renegotiate the Protocol, pointed out that the Explanatory Memorandum to the *BSA* bill in 1992 '… makes clear that s.160(d) was enacted to require the ABA as a statutory authority to act in conformity with Australia's

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7 Government of New Zealand, Submission no. 24 p 152

8 Federation of Australian Commercial Television Stations, Submission no. 25 attachment (Submission to ABA review, September 1998), p 2

9 N Herd (Screen Producers Association of Australia), Evidence 4 December 1998 p 24,26

international obligations, in particular, with the 1988 Protocol…'[1011] The New Zealand government also argued that there was no oversight in 1988.[12]

3.12 FACTS took the view that the implications of section 160(d) was not clear to the legislators:

> Whatever the intentions of the Australian negotiators of the Services Protocol in 1988, the Protocol's implications for cultural policy regulation was at no time clearly conveyed to Parliament, to the Government agencies responsible for cultural policy regulation, or to vitally interested industry and community groups… the inclusion of s.160(d) in the new [Broadcasting Services] Act in 1992 did not serve to alert those interested parties to the Protocol's implications; the Explanatory Memorandum simply noted (page 80): 'Requires the ABA to perform its functions in a manner consistent with various matters, including Australia's international obligations or agreements such as Closer Economic Relations with New Zealand.' This clause appears to have attracted no attention at all in the parliamentary passage of the legislation.[13]

3.13 In arguing that a cultural exemption should now be sought, submissions pointed to the cultural exemption sought by Canada in the North American Free Trade Agreement, and also to Australia's position in favour of cultural exemptions in more recent trade negotiations such as the General Agreement on Trade in Services (1995) and the Multilateral Agreement on Investment.[14] (Some further analogies are noted in APPENDIX 2)

3.14 The advantage of the examples mentioned above is that the issue of cultural exemption is being (or was) discussed before the signing of any Agreement. The problem facing the australian government in the current situation in relation to paragraph 160 (d) is that it faces the need to negotiate after the signing of the CER Protocol.

3.15 Not surprisingly, the New Zealand production industry argued that the CER Protocol should stand without prejudice to Australia's position in other future treaty negotiations:

> '…it is possible (and desirable) for Australia to ring-fence CER - as a pre-existing agreement- without implications for other international trade and trade policy interests Australia might wish to pursue.'[15]

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10 Department of Foreign Affairs and Trade, Submission no. 35 p 1

11 See also J Wise (DFAT), Evidence 4 December 1998 p 22

12 G Randal (New Zealand High Commission), Evidence 4 December 1998 p 25

13 Federation of Australian Commercial Television Stations, Submission no. 25 p 154

14 Australian Film Commission, Submission no. 29 p 248-9

15 Screen Producers and Directors Association [NZ], Submission 12 p 42. Similarly G Randal (New Zealand High Commission), Evidence 4 December 1998 p 25

3.16 The Committee notes that the Department of Foreign Affairs and Trade stated in evidence that a change to the CER Protocol would require the consent of the New Zealand government, and said that '…such a move is not being contemplated by either government.'[16]

3.17 However, the Committee believes that the evidence put before it in this inquiry suggests that there are good reasons for the Australian government to seek to return to the negotiating table with New Zealand. The Committee notes the long-standing bipartisan political support for the Australian content rules on television. The Committee affirms the importance of the Australian content rules and their cultural objective. This is also the position of the government as stated in the Department of Communications, Information Technology and the Arts submission:

> The Government has recognised that it has an important and necessary role in creating an environment which encourages cultural development and provides greater opportunities for participation in, and access to, cultural activities for all Australians. Film and television product is subsidised for cultural reasons through a mix of direct subsidy and tax concessions. Content regulation complements these subsidies by ensuring that Australian audiences have access to that product.[17]

3.18 The Committee notes that several other countries have sought cultural exemptions in international trade agreements. The Committee affirms the importance of such exemptions. The Committee expects that the Australian government will maintain its insistence on cultural exemptions in future trade negotiations. Accordingly,

Recommendation 5

The Committee recommends that, in accordance with the Canadian precedent, an exclusion clause for cultural industries should be inserted in all future trade agreements with other countries.

Recommendation 6

The Committee recommends that the Department of Foreign Affairs and Trade examine the government's obligations under other treaties to which Australia is a party to, with a view to the government beginning negotiations to remove any possible applications to cultural industries.

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16 J Wise (Department of Foreign Affairs and Trade), Evidence 4 December 1998 p 12

17 Department of Communications, information technology and the Arts, Submission no.32, p 4

3.19 In the case of the CER Agreement with New Zealand, the Committee believes that the Australian government should seek to reach an agreement with New Zealand on the issue of cultural exemption within the CER Protocol. Accordingly

Recommendation 7

The Committee recommends that the government approach the New Zealand government to seek an amendment to the Closer Economic Relations (CER) Protocol which would insert a "cultural industries clause" to exempt services relating to cultural industries from the Protocol.

Alan Eggleston

Chairman