



Full Federal Court rules in favour of the ABA but Project Blue Sky has sought leave to appeal to the High Court.

ABA wins Australian content appeal

In a judgment handed down on 12 December 1997, the Full Federal Court upheld the ABA's appeal against the recent Federal Court decision about its Australian content standard. A single judge of the Federal Court had ruled that the ABA's Australian content standard for commercial television was invalid in so far as it did not include New Zealand programs.

Project Blue Sky Inc., representing the New Zealand film and television production industry, has sought leave to appeal the Full Court ruling in the High Court. Pending the outcome of this application the ABA's existing Australian content standard will stand.

The applicants must file and serve their summary of arguments for the High Court hearing by 4 February. The ABA has 21 days from that date, i.e. until 25 February, to respond.

'The ABA is pleased that the Full Court affirmed the ABA's approach to Australian content on commercial television,' said Mr Peter Webb, ABA Chairman. 'Our regulatory preoccupation remains with the Australian audience in this case for commercial television programs and the

meticulousness of our approach has stood us in good stead.'

The Full Court found in the ABA's favour by a majority of two to one. Justices Wilcox and Finn allowed the ABA's appeal with Justice Northrop dissenting.

'Australia and New Zealand have much in common: geography, history, ethnic background, language and culture,' Wilcox and Finn JJ said in their reasons for judgement. 'The two countries have shared the vicissitudes of peace and war. Their peoples are perhaps as close as the peoples of any two countries can be. Yet New Zealand is not Australia and a New Zealand program is not an Australian program.'

'The only standard the ABA could set, consistent with the (CER) Protocol, would be one which allowed for there to be no Australian content programs at all, provided that New Zealand programs were broadcast in lieu of programs having Australian content. While one may be able to describe this as determining a standard, it is not one that puts into effect the statutory obligation to determine a standard that relates to the

Australian content of programs,' their Honours said.

The Full Court has made clear the pre-eminence of the specific cultural objective in the Broadcasting Services Act over the general obligations under the CER Agreement.

It is anticipated that Project Blue Sky's application to appeal the decision to the High Court will be heard in April 1997.

History of the appeal

In September 1995, the ABA concluded a wide-ranging public review of the Australian content requirements for commercial television. The new Australian Content Standard and variations to the Children's Television Standards, which came into effect on 1 January 1996, are the result of this extensive consultation by the ABA.

The Australian Content Standard for commercial television requires the transmission of Australian made programs and minimum levels of Australian preschool programs, children's drama, adult drama, and documentaries.

In its review the ABA came to the conclusion that there was a real legal impediment

to the recognition of New Zealand persons and programs in the standard. The definition of 'Australian program', for the purposes of the Australian Content Standard, does not include programming produced by New Zealanders.

Project Blue Sky Inc., representing the New Zealand film and television production industry, took the view that the ABA's standard contravened Australia's treaty obligations under the CER Agreement by not according national treatment to New Zealand programs.

In his ruling of 2 August 1996, Justice Davies indicated the ABA cannot include New Zealand persons or programs as Australian for the purpose of the Australian Content Standard. His Honour said it was, however, otherwise open to the ABA to determine a standard which is consistent with the Protocol on Trade in Services (the Protocol) of the Australia New Zealand Closer Economic Relations — Trade Agreement (CER Agreement). In its notice of appeal the ABA sought a review of that ruling.

The ABA's appeal was heard before the Full Court of the Federal Court in Canberra on Friday 1 November. □