The High Court has upheld an appeal by Project Blue Sky Inc., representing the New Zealand film and television production industry. The High Court has ruled that Any program standard developed by the ABA must be consistent with Australia's agreements with foreign countries.

High Court decision threatens Australian content on TV

The High Court has ruled that the ABA's quotas for Australian content on commercial television must include New Zealand programs.

In ruling that New Zealand programs must be treated the same as Australian programs, the High Court has said the ABA cannot give preference to the objective of promoting the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity over Australia's international obligations. Any program standard developed by the ABA must be consistent with Australia's agreements with foreign countries.

'If by reason of an obligation under a convention or agreement with a foreign country, it is impossible to make an Australian standard that is consistent with that obligation, the ABA is precluded ... from making the standard,' the High Court said.

"Today's decision undermines the regulatory framework that enables Australian audiences to enjoy Australian television programs,' said Professor Flint, ABA Chairman. 'It also has significant implications beyond the ABA's program standard now we know international treaties seriously limit the ABA's capacity to promote the objects of the Broadcasting Services Act.'

The High Court upheld an appeal by Project Blue Sky Inc., representing the New Zealand film and television production industry. Project Blue Sky alleged that the ABA's standard for Australian content on television contravened the Australia New Zealand Closer Economic Relations Trade Agreement (the CER) by giving television programs made by Australians preferential treatment over programs made by New Zealand nationals.

'The lesson to be learnt from the conflict between the CER and the requirement for Australian content of television programs is that Australia must be very cautious about entering into international agreements that encompass cultural industries,' he said.

'We must ensure that a balance is struck so that international commitments which promote the creation of economic wealth and commercial development are not undertaken at the expense of cultural objectives that go to the heart of Australian identity and contribute to our social wealth and well being.'

'Strong Australian content regulation for television has been one of the cornerstones of Australian cultural policy for almost forty years. It is fundamental to ensuring we continue to be able to express our unique cultural identity in ways that are accessible to all Australians.'

'The issues involved in the case are complex and this is reflected in the High Court's judgement. The ABA's standard is still in force, but we will have to examine how we implement the High Court's ruling now that the law is clarified,' said Professor Flint.

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The High Court said, 'the ABA could determine a standard that required that a fixed percentage of programs broadcast during specified hours should be either Australian and New Zealand programs or that Australian and New Zealand programs should each be given a fixed percentage of viewing time.'

Extracts: Court's Reasons for Judgement

In the magority judgement of McHugh J, Gummow J, Kirby J and Hayne J:

80 ... When s.122 is read with s.160, the legal meaning of the s.122 is that the ABA must determine standards relating to the Australian content of programs but only to the extent that those standards are consistent with the directions in s.160. If, by reason of an obligation under a convention or agreement with a foreign country, it is impossible to make an Australian content standard that is consistent with that obligation, the ABA is precluded by s.160 from making the standards, notwithstanding the literal command of s.122(1) and (2). Accordingly, in making the Australian Content Standard in December 1995, the ABA was under an obligation to ensure that the Standard was not inconsistent with the Trade Agreement or the Protocol.

88 Nor is there anything in the Act — including the combined effect of s.160 and the Trade Agreement — which prevents the ABA from determining a standard relating to the Australian content of programs in cases where preferential treatment cannot be given to Australian programs. the phrase 'the Australian content of programs' in s.122 is a flexible expression that includeds, inter alia, matter that reflects Australian identity, character and culture ... Nothing in the notion of Australian content of programs requires, however, that a standard made pursuant to s.122 must give preference to Australian programs.

89 The ABA has complete authority to make a standard that relates to the Australian content of programs as long as the standard does not discriminate against persons of New Zealand nationality or origin or the services that they provide or against the members of any other nationality protected by agreements similar to those contained in the Protocol.

96 ... while the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreement are expressed in indeterminate language as the result of compromises made between the contracting State parties. Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed. The problems that might arise if the performance of any function of the ABA carried out in breach of Australian's international obligations was invalid are compounded by Australia being a party to about 900 treaties.

Extracts from the *Broadcasting Services Act 1992*

122. (1) the ABA must, by notice in writing:

(a) determine standards that are to be observed by commercial television broadcasting licensees; and

(b) determine standards that are to be observed by community television broadcasting licensees.

(2) Standards under subsection (1) for commercial television broadcasting licensees are to relate to:

(a) programs for children; and

(b) the Australian content of programs.

(4) Standards must not be inconsistent with this Act or the regulation.

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

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

Background to Australian content on commercial television

Since its introduction in 1961, Australian content regulation has fostered the development of a strong domestic production industry which now creates Australian television programs appreciated by audiences throughout the world.

The present program standard for Australian content on commercial television came into effect on 1 January 1996 following a wide-ranging public review by the ABA of the previous requirements.

The Australian Content Standard promotes the role of commercial television in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to programs produced under Australian creative control.

All commercial television services must comply with the standard which has two main mechanisms: an overall transmission quota and minimum quotas for specific types of programs.

The transmission quota sets an overall annual minimum level of 55 per cent Australian programming between 6.00 am. and midnight. There are specific annual quotas for minimum amounts of first release Australian programs in the categories of drama, documentaries and children's programs.

Ten hours of first release Australian documentaries must be broadcast, 130 hours of first release Australian C classified children's programs (including 32 hours of children's drama) and 130 hours of first release Australian P classified preschool programs. The amount of Australian drama is expressed as a score, rather than in hours, and is calculated using a measurement system which multiplies a 'format factor' by the duration of the program.

Challenge by the New Zealand production industry

In developing the present Australian content standard 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 Trade in Service Protocol to the Australia New Zealand Closer Economic Relations (CER) Trade Agreement. Project Blue Sky claimed the ABA's standard did not accord national treatment to New Zealand programs and commenced legal proceedings against the ABA.

On 2 August 1996, Justice Davies of the Federal Court ruled that it was open to the ABA to determine a standard which is consistent with the Protocol to the CER Agreement. The ABA appealed this decision to the Full Federal Court. On 12 December 1996, in a majority judgement, the full court upheld the ABA's appeal.

Project Blue Sky appealed the Full Federal Court's decision to the High Court, which heard the appeal on 29 September 1997.