



or are accustomed to act, or under a contract, arrangement or understanding are intended or expected to act, in accordance with the directions, instructions or wishes of or in concert with the person;

- if a person has company interests in a company exceeding 15 per cent, the person is to be regarded as being in a position to exercise control of the company.

Company interests, in relation to a person who has a shareholding interest, a voting interest, a dividend interest or a winding up interest, means the percentage of that interest.

A person may have a voting interest, a dividend interest or a winding up interest in a company even if the person does not have a beneficial entitlement to, or to an interest in, shares in the company.

Extracts from the Broadcasting Services Act

60. A person must not be in a position to exercise control of:

- (a) a commercial television broadcasting licence and a commercial radio broadcasting licence that have the same licence area; or
- (b) a commercial television broadcasting licence and a newspaper that is associated with the licence area of the licence; or
- (c) a commercial radio broadcasting licence and a newspaper that is associated with the licence area of the licence.

Newspaper is defined in the Act as:

'newspaper' means a newspaper that is in the English language and is published on at least 4 days each week but does not include a publication if less than 50% of its circulation is by way of sale.

The ABA has begun a review of the Australian Content Standard and expects to release a discussion paper by the end of June. The ABA is reviewing the standard following the recent High Court ruling that the standard must be consistent with Australia's obligations under the Closer Economic Relationship with New Zealand.

ABA reviews Australian content rules

The ABA has begun a review of the Australian Content Standard for commercial television following the recent High Court ruling that the standard must be consistent with Australia's obligations under the Closer Economic Relationship with New Zealand.

'The ABA will be releasing a discussion paper in about a month,' said Professor David Flint, ABA Chairman. 'The paper will identify a range of options for implementing the Court's ruling and will be the basis for initial submissions and consultation.'

'The Court has made it clear that the ABA must vary the standard or determine a new standard which is consistent with Australia's obligations under the CER agreement,' said Professor Flint.

'The ABA's discussion paper will set out a timetable for this process of review. This will allow for submissions from interested parties to be followed by appropriate consultations.'

'Given the interest in this issue by the Australian and New Zealand production industries, Australian television licensees and the community

generally, the ABA's discussion paper will be distributed widely.'

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

High Court's decision

On 28 April 1998 the High Court ruled that the ABA's Australian Content Standard was 'unlawfully made' as it is inconsistent with Australia's treaty obligations under the CER. The standard remains in force but the ABA must implement the Court's ruling.

The High Court offered some suggestions concerning a new or revised standard. It 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. that Australian programs.

An alternative approach discussed by the High Court identifies 'Australianness' by reference to the content of the program. The High Court said,

A program will contain Australian content if it shows aspects of life in Australia or the life, work, art, leisure or sporting activities of Australians or if its scenes are or appear to be set in Australia or if it focuses on social, economic or political issues concerning Australia or Australians.

Australian content on commercial television

The 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. As currently framed in the standard, 'Australian content' of programs is identified by who makes the programs.

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 a.m. 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.

Extract from the Australian content standard

What is an Australian program?

7. (1) A program is an Australian program if:
 - (a) it is produced under the creative control of Australians who ensure an Australian perspective, as only evidenced by the program's compliance with subclause (2), subclause (3) or subclause (4); and
 - (b) it was made without financial assistance from the television production fund.
- (2) A program is an Australian program if:
 - (a) the Minister for Communications and the Arts has issued a final certificate under section 124ZAC of Division 10BA of Part III of the *Income Tax Assessment Act 1936* in relation to the program; and
 - (b) the certificate is in force.
- (3) A program is an Australian program if it has been made pursuant to an agreement or arrangement between the Government of Australia or an authority of the Government of Australia and the Government of another country or an authority of the Government of another country.
- (4) Subject to subclause (5), a program is an Australian program if:
 - (a) the producer of the program is, or the producers of the program are, Australian (whether or not the program is produced in conjunction with a co-producer, or an executive producer, who is not an Australian); and
 - (b) either:
 - (i) the director of the program is, or the directors of the program are, Australian; or
 - (ii) the writer of the program is, or the writers of the program are, Australian; and
 - (c) not less than 50% of the leading actors or on-screen presenters appearing in the program are Australians; and
 - (d) in the case of a drama program—not less than 75% of the major supporting cast appearing in the program are Australians; and
 - (e) the program:
 - (i) is produced and post-produced in Australia but may be filmed anywhere; and
 - (ii) in the case of a news, current affairs or sports program that is filmed outside Australia, may be produced or post produced outside Australia if to do otherwise would be impractical.
- (5) If an Australian program:
 - (a) is comprised of segments which, if they were individual programs, would not comply with subclause (4); and
 - (b) is not a news, current affairs or sports program; only those segments that, if they were individual programs, would comply with subclause (4) are taken to be Australian programs.

Copies of the full Australian Content Standard are available from the ABA, tel 02 9334 7700, or on the ABA Web site: www.dca.gov.au/aba/hpcov.htm