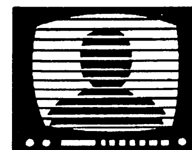

Free trade agreement threatens local content rules

Michael Gordon-Smith, *Executive Director, Screen Producers' Association of Australia*

On 19 July in the Federal Court before Justice Davies, Project Blue Sky, a New Zealand government and industry funded pressure group, sought to have the Australian content rules for television ruled invalid. The case, *Project Blue Sky Inc & Ors v Australian Broadcasting Authority*, had been remitted from the High Court. What's behind it?

Australia has entered into a free trade agreement, the Closer Economic Relations Treaty (the Treaty), with New Zealand. Australia also has rules requiring a small amount of local drama, documentary and children's programming on commercial free-to-air television; as well as a transmission quota requiring half the programming between 6am and midnight to be Australian. These content rules impose a cost on Australian broadcasters by compelling them to pay enough to make some Australian production possible. New Zealand has decided such regulations are undesirable. With the US, and against France and Australia, they argued against them in the GATT negotiations.

There are no restrictions on trans-Tasman program sales. Programs are sold. Most are sales of secondary usage rights of finished programs, reflecting the general international pattern. Larger markets sell more to smaller ones than they buy back. Prices paid by secondary users are only a small percentage of production cost. New Zealand imposes a licence fee on television viewers, which it uses to subsidise local production.

However, Project Blue Sky spotted the chance for a windfall, a chance for arbitrage: if the Treaty can be made to apply to local television programs, then New Zealand programs could be made to count as Australian. As a side effect, Australian broadcasters could then meet Australian content obligations more cheaply as secondary users. New Zealand programs would not be intrinsically more attractive, but the non-intrinsic benefits might be enough to sell them - just as tax advantages have made investment in boutique primary production, and some films, saleable.

If the New Zealanders are successful, it will allow Australian broadcasters to buy compliance cheaply and help New Zealand producers to make new sales, possibly at premium prices: compliance would be bargain-basement cheap even at five times the usual international sale price. The Australian industry and the Australian audience will lose. The integrity of the standard will be undermined, and a dangerous precedent established for other trade agreements.

Legal arguments

The Hon Bob Ellicott QC appeared for Project Blue Sky. He argued that under the Treaty, together with section 160 of the Broadcasting Services Act 1992 (the Act), the ABA must provide for equal treatment of New Zealand programs when determining standards on the Australian content of programs under section 122. The meaning of 'Australian' under section 122 of the Act was not at issue. In producing its standard, he said, the ABA must simply make provision for equal access and treatment of New Zealand programs. One way they could do this would be to establish a requirement for Australian programs, but diminish the obligation to the extent that New Zealand programs are broadcast. Attaching a notion of New Zealand program to the standard would, he said, clearly be within the ABA's powers.

In reply, Alan Robinson, representing the ABA, argued that the effect of this proposal would make it possible for the licensee to comply with the regulation by using only New Zealand programs. This would clearly not be consistent with the aims of the Act.

He argued that the obligation imposed on the ABA by section 160 of the Act 'to perform its functions in a manner consistent with...any agreement between Australia and a foreign country' was only one of a number of obligations in that section, including those requiring the ABA to have regard to regulatory policy and the objects of the Act. Project Blue Sky's case, he said, compelled them to 'go for the lot'. In doing so, they attempting to be included as Australian content, not as part of the remainder. Justice Davis has reserved his decision, which is expected withinsix weeks.

What next?

Australian content cannot be satisfied by non Australian content. If the New Zealanders are successful, there may be some uncertainty as to what the rules actually impose. What standard would currently pertain? None? ❑