TV trade: Closing Economic Relations

Project Blue Sky Inc & Ors V Australian Broadcasting Authority, No NG 807 of 1995, Davies, J. Sydney, 2 August, 1996

The New Zealanders had been waiting for their day in court. On 2 August, they got it.

Ever since Australia and New Zealand entered into a Trade in Services Protocol to the Closer Economic Relations Agreement (CER) in 1988, some New Zealanders had argued that Australia's local content requirements should allow New Zealand programs to qualify for the quotas.

The Protocol requires both sides to remove all measures, such as quotas, which interfere with free trade between Australia and New Zealand, other than those which either country specifically chose to exclude from the Protocol's coverage. Australia's local content quotas were not excluded. Therefore, argue the New Zealanders, Australia had to either remove the quotas altogether, or allow New Zealand programs to qualify for them.

This much was a political and diplomatic argument.

A Bob each way

The Australian government had a chance to straighten the matter out in 1992 when it rewrote the Broadcasting Act (now the Broadcasting Services Act). Although the then Minister, Senator Bob Collins, made it clear that he wanted the CER obligation implemented, the legislation was not drafted to achieve this result.

The definition of an 'Australian drama program' for the purposes of the Australian content requirements introduced in that legislation for subscription television (pay TV) broadcasting licences expressly includes a drama program 'that is to be treated as an Australian drama program under an agreement between Australia and another country'. It is clear that New Zealand programs will count towards the 10%-of-program-expenditure requirement for pay TV drama channels.

But in the more significant area of standards for commercial TV licensees (Channels 7, 9 and 10), a different legislative approach was adopted. Australian Broadcasting Authority (ABA) was given an obligation to make standards relating to 'Australian content in programs' (s. 122), but 'Australian content' was not further defined. In addition, a general obligation was introduced across the ABA's entire operations, requiring the ABA 'to perform its functions in a manner consistent with ... Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country' (s. 160(d)). CER is specially mentioned as an example in the Explanatory Memorandum. The plan was clear - New Zealand programs were to be made to count towards the quotas, without actually saying so directly in the legislation.

On the sheep's back

Collins, no doubt believing the legislation had been drafted to achieve the result he intended, wrote his infamous 'riding instructions' letter to newly appointed ABA Chair Brian Johns, asking him to look at the treatment of New Zealand programs, amongst other issues, as a matter of priority.

The Australian production industry had been making it very clear that it was not happy with the proposed inclusion of New Zealand programs under the Australian standard. It argued that the New Zealand production industry, unsuccessful in convincing its government of the advantages of quotas, was simply trying to take advantage of Australia's.

When the ABA reviewed its Australian Content Standard in 1995, it sought legal advice on what the Broadcasting Services Act obliged it to do. It was advised not only that it was not obliged to do what Collins and his department and the New Zealanders wanted, but that it was not *permitted* to do so.

Since 'Australian' is not defined in the Broadcasting Services Act, one needs to look to the definition it is given in the Acts Interpretation Act. Simply, 'Australian', unless otherwise defined in a particular Australian statute, means Australian. It does not mean 'Australian or New Zealand'. If the Parliament had wanted the ABA to make standards about Australian and/or New Zealand content in programs, then it should have said so.

So the ABA made a new standard which came into effect from the beginning of this year which made no mention of New Zealand programs.

At this point, the New Zealanders decided to go beyond the politics and the diplomacy and take the matter to the courts. It did so through a lobby group called Project Blue Sky, funded mainly by producers and gov-

ernment agencies. Project Blue Sky and a number of producers (Top Shelf Productions, Communicado, South Pacific Pictures, Gibson Group and Frame Up Films) argued that the ABA had erred in law by making a standard which was inconsistent with Australia's CER obligation.

Justice Davies, in the Federal Court, agreed with them.

What it means to be Australian

But in a case that had has more than its share of twists, Davies produced another.

He agreed that the ABA had no authority to define New Zealand programs as Australian. He also agreed that if there was an inconsistency between the terms of the Protocol and the provisions of the Broadcasting Services Act, the Act would prevail. That is, the ABA must do what its legislation tells it. It's the Parliament's job to ensure that the legislation is consistent with Australia's international obligations.

However, he found that the way the ABA had chosen to frame its standard was not the only way it could have done so. He thought there was at least one other way in which the standard could have been framed that could have both served the object of the Act ('to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity' - s. 3(e)), as well as fulfil the ABA's s. 160(d) obligation to act consistently with Australia's international obligations.

Justice Davies liked the idea presented to him by Project Blue Sky's counsel, Bob Ellicott QC, that the ABA could:

> 'adopt a standard such as was adopted but ... provide that the obligations under it were reduced to the extent to which New Zealand programs were broadcast during the specified period. Such a standard would be within power for it would impose duties with respect to the Australian content of standards. [sic] It would impose no duty with respect to New Zealand programs'.

The result would be that New Zealand programs would have access to Australia's commercial TV system no less favourable than that offered to Australian programs - just as the CER Protocol requires.

The judge noted that 'non-lawyers' might feel there would be no difference between a standard framed in this way, and one which simply extends the definition of Australian programs to encompass New Zealand programs. He stressed, however, that there was in fact 'a fundamental difference'. The Ellicott approach would effect a standard which imposed an obligation only with respect to programs involving Australians; whereas treating New Zealand programs as Australian would amount to an obligation involving Australian and New Zealand programs.

A necessary feature of any acceptable alternative approach must be that it not frustrate the achievement of the objects of standards. Justice Davies said that would be the case '[i]f it were likely that New Zealand programs would be so popular as to overwhelm Australian programs and so frustrate the object sought to be achieved'. The judge found no evidence before the court to support this conclusion, although it is a view unlikely to be shared by the Australian production community.

On 26 August, Justice Davies declared the Standard invalid and ordered the ABA to vary it to include New Zealand programs by 31 December.❑

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