Blue Sky in High Court

AUSSIE WONDERHORSE BEATS THE WORLD
NEW ZEALAND HORSE LOSES IN AMERICA
Alternative headlines prepared by a Melbourne newspaper to report the result of the Kentucky Derby, according to the 1984 Australian movie Phar Lap.

Ten months after the full Federal Court found against the New Zealand industry group Project Blue Sky in a case dealing with the treatment of New Zealand programs under the Australian Broadcasting Authority's Australian Content Standard, the parties found themselves back in court.

On 29 September, five High Court judges – Brennan CJ and McHugh, Kirby, Gummow and Haine JJ – heard Bob Ellicott QC for Project Blue Sky and Roger Gyles QC for the ABA do it all again.

The New Zealanders are arguing that the ABA erred in determining the Standard in 1995, by failing to treat New Zealand programs as favourably as Australian programs. They claim this is required under the Trade in Services Protocol to the Australia New Zealand Closer Economic Relations Agreement, signed in 1988.

The ABA is arguing that the Broadcasting Services Act gives it inconsistent directions – one to make a standard about 'Australian content in programs' (which must mean 'Australian' content, not 'Australian or New Zealand content') and the other to perform its functions consistently with Australia's international obligations, which include CER. The ABA says it managed this tension by following the specific obligation to make an Australian content standard, rather than the general obligation about international treaties.

Both cases were subjected to intense probing by the court.

Ellicott argued that 'It's not really very difficult'. The two obligations, he says, are not inconsistent. The ABA could fulfil its obligation 'to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity' with an Australian content standard that treated New Zealand programs as favourably as Australian programs. The ABA might not be able to promote Australian programs as much as it would like, but its job is to balance the potentially conflicting demands and goals set for it by the Parliament.

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Simply, 'The Parliament has said it is possible to do both,' he said. The Explanatory Memorandum to the legislation expressly mentions the CER agreement in this context, a clear message that the Parliament had thought about the issue and passed legislation appropriate to the task. 'They're sitting on the green chairs and the red chairs,' he said, and the CER issue 'couldn't be closer to the Parliamentary mind'.

Chief Justice Brennan mused that 'It might be that Parliament, sitting on the green chairs or the red chairs, wants to have it every which way... unaware that it was imposing on the ABA obligations that may be inconsistent'.

Justice McHugh suggested that the transitional provisions passed with the 1992 Broadcasting Services Act, undercut Ellicott's argument. The transitional provisions expressly preserved the Australian Content Standard determined by the Australian Broadcasting Tribunal (TV Program Standard 14), which did not make any special provision for New Zealand programs. Ellicott responded that the Parliament had intended that TPS 14 be preserved only until the new regulator made a new standard consistent with the new law – it did not want a period when there was no standard at all.

Ellicott said it was all about providing a 'level playing field' for New Zealand and Australian programs. The Australian production industry had created a degree of 'hysteria' about the likely implications for it of implementing the CER commitment. Australian TV program exports to New Zealand outweighed New Zealand exports to Australia 50-to-1. That hysteria 'had imbedded itself in the minds of the lower court'. Justice Kirby felt the 'level playing field' was a 'weasel expression'.

Ellicott's central contention was that the ABA had not even tried to implement the CER commitment. It had simply accepted its legal advice that it could not do it, while also carrying out its obligation to make a standard about Australian content in programs. It was not the court's job to decide if the ABA had performed its functions wisely, but it was its job to decide if the ABA had completely failed even to attempt to carry out one of its functions.

In response, Gyles argued that Ellicott had never indicated exactly how the ABA, in practice, could have implemented both its obligations simultaneously. Determining a quota which could be met by Australian or New Zealand programs would be, in effect, determining not an Australian

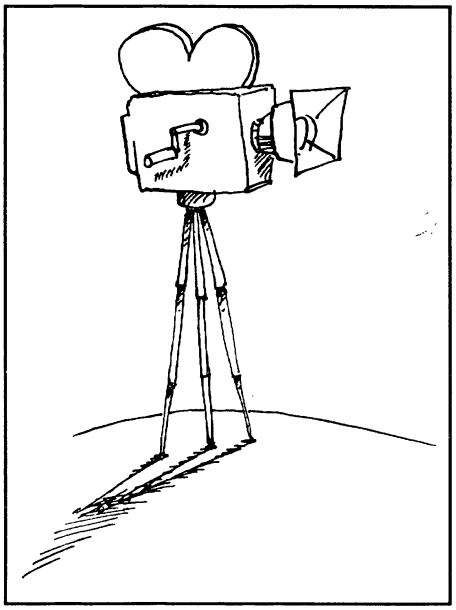
content requirement but an Australian/New Zealand content requirement. Saying that New Zealand content is the same as Australian content 'is to do violence to the purpose of the standard in the first place'.

The formulation proposed by Davies J in the Federal Court (the judge who first heard the case) was 'mere sophistry and a triumph of form over substance,' said Gyles. Despite intense questioning from the Court, Ellicott did not submit any new proposal, although he did agree to provide this to the Court after the hearing. In turn, the Court agreed to permit a response to any such formulation from the ABA.

The court explored the possibility of a standard which required Australian 'content' (subject matter) but not Australian 'origin' (creative control). This took it back through the contentious ground, which was mined by the ABT with its 'Australian Look' proposal of 1988 and largely eliminated from the final standard. Gyles argued that the involvement of Australians in the production process has always been fundamental to the idea of Australian content, basing his argument on an analysis of the historical origins of the Australian content provisions.

Parliament has always intended that Australian content requirements would help the Australian industry, he said. They were not about talking 'programs from Estonia, Czechoslovakia, India and as long as they've got koalas in them they'll be Australian'. If his argument was true, Gyles said, 'the conflict [between the obligations to make an Australian content standard and to act consistently with CER] is irreconcilable'. The content/origin distinction would raise 'a heap of regulatory problems'.

Ellicott hinted at this approach as a way through any conflict, but stressed that his client 'might want to argue otherwise elsewhere'. (The New Zealanders, in fact, don't want any conflict resolved this way, since it would restrict them to making programs about Australian subject matter, when what they want is for their own programs, on any subject matter, to qualify for the Australian quotas.) Gyles responded that Ellicott was 'enlivening the minds of the court with an argument he is not prepared to put himself'.



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Justice Kirby stressed the unusual nature of the express provision in the Broadcasting Services Act requiring the ABA to perform its functions consistently with Australia's international obligations. It was a provision he was 'not going to read ... out of the Act lightly'. He asked Gyles if his interpretation of the ABA's obligation in relation to Australian content standards was 'all Fortress Australia, whereas the thrust of the treaty is a regional economy, a global econ-omy'.

'This court,' he said, 'has said that where there is conflict, the statute should be interpreted in a way that gives effect to the international obligation, especially as here where the Parliament has specifically directed it [in referring in the Explanatory Memorandum to the CER agreement]'.

The Court granted 'amicus curiae' ('friend of the court') status to a group of Australian production industry and film funding organisations and filmmakers. Stephen Gageler, acting for them, argued that a host of other trade agreements meant that a decision in favour of the New Zealanders would have significant additional implications. Multilateral agreements such as the General Agreement on Trade in Services (GATS), signed by Australia in 1994 and by over 130 other countries, required Australia to extend any preferential treatment offered to another country, other than members of a nominated economic integration zone, to all signatories to the GATS.

Australia had not formally advised that CER was such a zone. Thus, treating New Zealand programs as favourably as Australian programs under the Australian Content Standard would require the programs of all other GATS signatories to be treated as favourably as Australian programs, undermining the whole purpose of the standard.

A further issue was the implication of the unusual provision (s128) inserted into the Act at the insistence of Senator Brian Harradine, which permits the Parliament effectively to rewrite ABA standards itself at any time. The court needed to consider whether the Parliament's failure to exercise this power to 'correct' any error in the ABA standard could be seen as evidence that the ABA had not erred in carrying out the Parliament's intention.

In all, it was a day of intense questioning of both sides, with no clear indication of the likely outcome.

The court rose, awaiting the further submissions noted above, which were expected within days.

Jock Given