



Further Blue Sky fall out

Marion Jacka of the Australian Film Commission's Policy Unit sets out the main points in the key submissions made to the Australian Broadcasting Authority's Australian Content Inquiry

Broadly speaking the submissions to the Australian Broadcasting Authority's (ABA) inquiry fall into three categories:

- the comprehensive approach taken by the production industry;
- the minimalist approach of the Federation of Australian Commercial Television Stations (FACTS) and the Department of Foreign Affairs and Trade (DFAT);
- the New Zealand approach as represented by Project Blue Sky and the New Zealand government.

Most of the major Australian submissions stress at the outset that the attempt to reconcile the cultural objectives of the Act with the trade imperatives of CER is an impossible task, and that the ABA should be relieved of this burden by the repeal of s160(d) of the *Broadcasting Services Act*.

Production industry submission

The September 1998 issue of *Communications Update* outlined the submission of the "production industry group" comprised of the Australian Film Commission (AFC) and 12 industry organisations (see full list at end of this article). That submission argued that a comprehensive package of measures was necessary in the attempt to maintain the integrity of the Australian content standard.

Five major Australian production and distribution companies, Artists Services, the Becker Group, Beyond International, Crawfords and Southern Star presented a joint submission which took a similar approach. The main proposals supported by this group include:

- the introduction of a license fee test for adult drama, documentary and children's drama to ensure Australian and New Zealand programs compete on an equal basis;
- tightening the creative elements test to include the requirement that programs are made by Australian controlled and managed production companies with majority Australian "ownership" (a similar test would apply for New Zealand programs);
- programs that have already been broadcast in New Zealand should not be treated as "first release" programs;
- series and serials in receipt of subsidy of more than 10 per cent of the budget should not be eligible programs;
- a reduction in the time bands from 6-11pm provided that programs broadcast from 5-6pm and 11-12pm may get full quota consideration for the first year of broadcast.

In addition the group supports increases in the quotas to be phased in over three years, and the introduction of a subquota for independent production. The quota increases proposed are a 20 per cent increase for adult drama, the documentary quota to go

from 10 to 30 hours and children's drama to increase by 10 per cent.

FACTS submission

The main points are as follows:

- FACTS would support legislative change to deal with the conflicting obligations in the Act.
- Allowing New Zealand programs to count won't reduce Australian programs as there is limited audience interest in New Zealand programs.
- There should not be any narrowing of existing creative elements test.
- There is no case to increase quotas or introduce any of the other substantial changes canvassed in the ABA paper.

A minimal approach should be taken to bring the standard into conformity with the High Court decision, as follows:

- Include New Zealanders in the creative elements test.
- Explore options such as minimum licence fees for subsidised programs, or an onscreen test which would operate in conjunction with an Australian/New Zealand provenance test (like the DFAT submission, see opposite).

If ABA monitoring shows there had been a negative impact, it is open to it to review the standard further. There should not be any narrowing of the existing creative elements test.

Onscreen test: FACTS says an onscreen test might be practicable if it applied only to sub-quotas and if it could be safely assumed that programs of Australian provenance would satisfy the onscreen criteria, unless there is "some extreme disqualifying factor."

Such a test would have to recognise

the breadth of subject matter of Australian programs. Also networks and producers would need to know in advance that a program would comply.

Floor price for licence fees for subsidised children's and "high end" drama:

subsidised children's drama and "high end" drama, i.e. telemovies and mini-series, to only qualify if the licence fee is paid at a commercial level - say 75 per cent of the rate set by the Film Finance Corporation (FFC).

FACTS supports the retention of 10BA as a gateway to eligibility and the extension of similar access to films certified under the New Zealand Film Commission Act.

The submission also supports the retention of quota status for co-productions and says that if New Zealand/Third Party co-productions have to count, "this is not likely to pose a problem given the small number involved".

Time bands: no grounds for reviewing exist. FACTS strongly supports the current time bands.

Definition of first release: no change is needed if the proposal for "onscreen" criteria is adopted. But FACTS would not object to a revised definition to exclude programs previously released on free-to-air television in the licence area or in New Zealand.

Department of Foreign Affairs and Trade (DFAT) submission

The proper treatment of the CER's market access and national treatment obligations. There is a distinction between the rights of the service provider and the product, i.e. between a program which contains Australian themes and advances Australian perspectives, and a program made by Australians.

The ABA can make a standard which relates to the Australian content of programs consistent with the Protocol by moving to an "onscreen" test.

Requiring New Zealand producers

to make an Australian program is not in breach of the CER Protocol.

Trans-Tasman Trade in Subsidised Services and Product. DFAT addresses the view that NZ subsidy arrangements might have a distorting effect on trade. It says "Both governments agree that government subsidies should not be applied in one country of the free trade area, including in the audiovisual sector, such that they have a direct distorting effect on the trans-Tasman trade in services.

DFAT suggests an aggrieved party could take action under either Australian or New Zealand law to prevent anti-competitive activity. (The submission goes on to say they understand it is difficult to get agreement on what constitutes dumping in the audiovisual area.)

The Proposal for an "onscreen" test. The department is proposing a "straightforward" program perspective requirement satisfied as appropriate with an onscreen and creative elements test. Recourse to actual "onscreen" testing could be limited to those situations where the Australian perspective of a program was in doubt.

There may be cases where mere Australian provenance is insufficient to guarantee an Australian perspective.

Similarly where an Australian perspective program was being proposed using substantially non-Australian elements, you could undertake preliminary checking of the Australian content.

Whether or not a program was Australian in content would be determined by the cultural perspective it actually projected, and by its onscreen effect.

DFAT suggests the ABA could omit both the 10BA and co-production gateways - the sole criteria would be an "Australian themes" onscreen test.

Project Blue Sky submission

The amendments should aim for

simplicity.

Nature of the test

PBS supports the retention of the creative elements test and agrees there may be problems with onscreen criteria. PBS is opposed to any tightening of the creative elements test.

It might be worth pursuing a combination of creative elements and onscreen criteria. But "onscreen" in relation to New Zealand access would have to specify a New Zealand look.

New Zealand official co-productions

The Protocol means that New Zealand/Third party co-productions should be treated the same as Australian/Third Party co-productions.

Increasing subquotas

Two options are outlined:

- Look at the likely level of sales of New Zealand programs (based on the annual levels of production and the international sales history of New Zealand programs). On this basis PBS suggests:

1. Drama: increase of 60 to 70 points per channel (currently 225 points). An increase of 26-30 per cent.

2. Children's drama: increase 5-6 hours per network (currently 32 hours). An increase of 15-19 per cent.

3. Documentary: increase of 7-8 hours per network (currently 10 hours). An increase of 70-80 per cent.

- Relate the proposed quota increase to a ceiling on total New Zealand programming as follows:

Single transmission quota/maximum New Zealand transmission quota

PBS's view is related to its proposal for a maximum New Zealand transmission quota. No figures are mentioned. PBS says the ceiling would have to be agreed between PBS and "key Australian stakeholders".

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PBS's agreement to a maximum level "is contingent on being satisfied with the other elements of the package".

If a maximum level of transmission is set, it is probably more efficient than to have a single quota, (reduced by the amount of New Zealand programs screened).

"If this option were considered, the ceiling on eligibility for New Zealand programs would need to be raised in progressive steps in order to comply with the national treatment obligation of CER". (This appears to mean that there would have to be a 50/50 split between the two countries - our comment).

First release

Oppose the ABA proposal that programs should have their first international release in Australia. But agree with the proposal to limit eligibility to programs made after January 1996.

Subsidised programs

Oppose the proposals regarding capping the maximum level of subsidy for eligible programs/limiting categories of subsidised programs eligible.

In conclusion, PBS states that a more complex approach could be a "belt and braces" approach designed to exclude New Zealand and undermine the High Court decision.

PBS also urges the ABA to conclude the review quickly and warns it might return to the High Court for further orders if there is any delay.

New Zealand government submission

New Zealand has reservations as to whether any combination of an "onscreen" and creative elements test would meet the national treatment provisions of the CER protocol. New Zealand's preference is for a single trans-Tasman creative elements test.

The New Zealand government would consider that restrictions upon subsidised programs could effectively be a barrier to market entry for New Zealand programs.

Onscreen test: the New Zealand government disputes the DFAT view that an onscreen test that gives quota access to Australian look programs made by New Zealanders but excludes programs made by New Zealanders with any other "look," would be CER compliant.

Re 10BA gateway: NZ is comfortable with either closing the 10BA gateway or making similar arrangements for NZ films as long as New Zealanders get equal treatment.

Co-productions: if a gateway is provided for Australian programs made under the provisions of a co-production agreement, then the same criteria should apply to New Zealand/third party programs.

Back catalogue: agree some form of time bar should apply, i.e. post-January 1996, to deal with the substantial back catalogue of New Zealand material.

First release: New Zealand's position is that programs which had their first release in either Australia or New Zealand should be eligible for quota.

Where to now?

The summary shows the difficulty of the ABA's task. The New Zealand parties are urging the most minimal of approaches and implying the possibility of further legal action if the outcome is not to their liking. The Australian production industry is urging a comprehensive package of measures which is strongly opposed by FACTS. And DFAT is saying there is a "straightforward" solution to the problem - the introduction of onscreen criteria combined in some way with the existing creative elements test. Apart from the fact that New Zealanders could make programs which "look" Australian, past assessments have been that use of an "onscreen" test would have significant policy and administrative problems.

As the AFC and others have stressed in their submissions to the Senate Inquiry, the review has only served to reinforce the necessity of repealing section 160(d) of the Act. The difference between the various options being considered by the ABA is essentially only one of degree. All, including the DFAT proposal for an "onscreen look" test, mean New Zealand programs will gain access to the Australian content quotas. As well as reducing the amount of Australian programs available on our screens, this threatens to undermine the case for maintaining content regulation for cultural purposes in future international trade forums.

(Note The organisations involved in the joint production industry submission are as follows: Australian Film Commission; Australian Children's Television Foundation; Australian Film Institute; Australian Guild of Screen Composers; Australian Screen Editors; Australian Screen Directors Association; Australian Writers Guild; Communications Law Centre; Film Australia Limited; Media Entertainment and Arts Alliance; Pacific Film & Television Commission; Screen Production Association of Australia).

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