# After Blue Sky: the options

*Michael Ward, policy manager at the Film Finance Corporation, discusses the Australian Broadcasting Authority's Discussion Paper on options for amending the Australian Content Standard after the High Court's Project Blue Sky decision*

With the release of its Discussion Paper reviewing the Australian Content Standard, the Australian Broadcasting Authority (ABA) has begun the process of attempting to reconcile the apparently irreconcilable issues placed before it in the wake of the High Court's Project Blue Sky decision: on April 29, 1998 the court ruled that the existing standard was made unlawfully.

The Australian Senate has also established its own inquiry into the implications of retaining, repealing or amending paragraph 160(d) of the *Broadcasting Services Act 1992*; the paragraph that requires the ABA to perform its functions in a manner consistent with Australia's treaty or international obligations.

The federal government has made its position clear. The ABA should make a new standard reconciling Australia's obligations under the Closer Economic Relations (CER) treaty, with the *Broadcasting Services Act's* cultural policy objectives.

The ABA's Discussion Paper reveals how complex an activity that reconciliation may prove to be. Indeed, the range of options presented and the possible combination of any number of these in a revised standard raise questions about how such an approach could practically operate, even setting aside whether it is sensible or desirable to allow cultural policy to be subject to Australian trade policy objectives.

The paper begins by considering the background for the review: the legal issues, including the High Court judgement, as well as the economic and policy context of local content regimes. The underlying cultural policy intent of the *Broadcasting Services Act* as stated in the Explanatory Memorandum to the Broadcasting Services Bill (the Bill) is noted.

In relation to s160 (d) the Explanatory Memorandum presented to parliament when the Bill was debated is cited as having specifically referred to "Australia's international obligations or agreements such as CER" which guarantee market access rights to New Zealand that are "no less favourable" than are provided to Australians.

The paper states:

*"There does not appear to be any other provision as sweeping as Section 160 (d) of the Broadcasting Services Act in imposing on a government agency a direct requirement to comply with all of Australia's international obligations."*

In an extensive section outlining policy issues, the paper addresses the significance of television in society and the economics of television markets in asserting the importance of local content rules. The ABA argues that because "high fixed and low marginal costs mean that programs can be sold to many buyers...even high cost U.S. television programs are available to Australian broadcasters for a substantially lower cost than the cost of producing or commissioning an Australian program".

First release drama, documentary, children's drama and C and P programs are identified as "most vulnerable to replacement by imported programs".

Commenting on the Australian industry's concern that New Zealand programs may displace Australian programs, the ABA identifies the "anticipated cost advantage of New Zealand programs" as the major reason for Australian broadcasters preferring them:

*"The ability to use New Zealand drama to meet Australian content requirements would create an incentive to broadcast less expensive New Zealand product, possibly in late night time slots".*

## Options for change

The second part of the paper poses a series of questions about various options and proposals for amending the standard. Broadly speaking, the ABA must develop a method for testing eligible programs through either a creative elements test or a test of program content based on "on- screen" criteria ("Australian look").

The majority High Court decision referred to these approaches to defining the Australian content of programs. By addressing only the subject matter and on-screen content of programs, the test could be said to treat New Zealanders the same as Australians. But if the test required New Zealanders to make "Australian" programs it might be open to legal challenge. So it proposes that there might be an equivalent New Zealand "on-screen" test.

It is pointed out that the ABA and its predecessor the Australian Broadcasting Tribunal have "rejected an on-screen test on both policy and administrative grounds". Following a previous legal ruling, standards must "establish general

criteria which are fixed in advance and certain in their meaning and application".

For either the "Australian look" or "creative elements" approaches, there are two alternatives:

- provide "New Zealanders and Australians with equal and equivalent access to the same test, eg., by treating a New Zealand and Australian actor as equivalent or "...to develop separate but parallel tests for Australianness and New Zealandness, respectively";

- the current creative elements test approach has the "advantage of being internationally consistent" and "if used to define Australian programs, a parallel New Zealand creative elements test could be used to define eligible New Zealand programs".

In 1996, New Zealand argued to the ABA that references to Australia and New Zealand should be interchangeable, effectively creating a "trans-Tasman" test.

To address any possible "dilution" of the effect of the standard, the ABA considers an option to increase the creative elements test, eg., to require *both* writer and director to be Australian (or New Zealander) and/or to increase the number of lead actors who must be Australian (or new Zealanders). The present standard requires only that *either* the writer or director be an Australian

Currently, programs can be also be automatically defined as Australian if they have already received either a 10BA tax concession certificate from the Department of Communication and the Arts, or are approved as an official Australian co-production by the Australian Film Commission.

Because it believes that maintaining the 10BA tax gateway to Australian content classification would require providing an equivalent New Zealand film tax incentive gateway, the ABA seeks comment on removing 10BA as a gateway for quota eligible programs.

The ABA also wants views on maintaining the Australian official co-productions gateway for quota eligible programs, given that New Zealand official co-productions with third party countries (currently the U.K., Germany, France, Canada and Italy) will "only qualify to the extent that they independently meet the test for eligible programs".

## How many programs are required?

The ABA considers that the inclusion of New Zealand programs in the Australian Content Standard "may require changes to the levels of eligible programs", noting that "increasing quota levels is one obvious option in response to the possible replacement of Australian programs".

Two options are canvassed regarding quotas:

- a single quota either satisfied by separately defined Australian or New Zealand programs, or eligible programs defined using a test open equally to Australian and New Zealand programs/nationals; or

- separate quota requirements for Australian and New Zealand programs.

**Drama program expenditure requirement:** an option is presented to introduce a requirement that broadcasters spend a certain minimum amount each year on eligible adult and children's drama programs. This would relate to programs commissioned or purchased from independent producers and money spent on inhouse production.

**Time bands for program eligibility:** the current time band in which eligible adult drama programs must screen is 5.00pm to midnight. The ABA states that "if the band is intended to capture the concept of prime time viewing then perhaps it should be defined as being from 6.00pm until 10.00pm". A time band for documentary programs is also suggested.

**Definition of "first release":** the paper recognises that the current definition of first release programs would allow any New Zealand programs, "however old and previously broadcast on New Zealand television", to count towards a broadcaster's "quota obligation". Consequently, "first release" options are presented such as requiring programs to have their international release in Australia, or that New Zealand programs have their first television broadcast in Australia, or to limit the definition of "first release" programs to those made after the introduction of the standard in 1996.

**Subsidised programs:** the ABA is interested in assessments of the impact of New Zealand public subsidy on the likely cost advantage of New Zealand programs and on a proposal that caps be placed on the level of subsidy that quota eligible programs can receive. An alternative option is that all quota eligible programs have a degree of marketplace attachment such as a commercial television presale. A third option is that certain types of subsidised program, for example, serial and series drama, could be either limited or made ineligible.

## The next stage

After it has received comments on the Discussion Paper, the ABA has indicated it may release a further paper before releasing a Draft Standard with the objective of having the revised standard in place from January 1,1999.

Further information can be obtained by telephoning the ABA. Copies of the Discussion Paper are available on the ABA's website: www.aba.gov.au

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