Communications LAW BULLETIN

THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION INCORPORATED

Print Post Approved PP: 234093/00011 EDITED BY ANDREW LAMBERT AND JASON MACARTHUR Vol. 17 No. 2 1998

True Blue v Blue Sky Australian Content Standards in Doubt

Jacqueline Brosnan looks at the recent High Court decision involving the Australian Content Standard and Project Blue Sky.

In a controversial decision the High Court has found that the Australian Content Standard ("**Standard**") was unlawfully made because it breached Australia's obligations under the "Protocol on Trade In Services" ("**Protocol**") between Australia and New Zealand. Leaders of the Australian film and television industries and members of True Blue (a local interest group) were quick to respond to the decision calling on the Federal Government to amend the *Broadcasting Services Act* 1992 ("**BSA**") to ensure the validity of the Standard and the viability of the industry. The Australian Broadcasting Authority ("**ABA**") is currently reviewing the Standard and preparing a discussion paper about standards for Australian content.

The case centred on the operation of a number of key provisions in the BSA including sections 122 and 160. Section 122 imposes an obligation on the ABA to determine standards for commercial telecommunications broadcasting licensees in relation to the Australian content of programs. Section 160 requires the ABA to carry out its functions in accordance with the directions given by that section, including in a manner consistent with Australia's obligations under any agreement between Australia and a foreign country.

AUSTRALIAN CONTENT STANDARD

The Standard, determined by the ABA on 15 December 1995 sets an overall transmission quota and minimum quotas for specific types of programs. The transmission quota sets an overall annual minimum level of 50% Australian programming between 6.00 am and midnight (as of 1 January 1998 this increased to 55%). Annual quotas for minimum amounts of first release Australian programs in the categories of drama, documentaries and children's programs are also prescribed.

Project Blue Sky, a consortium of companies involved in the New Zealand film and television production industry, argued that the Standard was invalid as it gave television programs made by Australians preferential treatment over programs made by New Zealand nationals, in breach of Australia's obligations under the Protocol. The Protocol requires Australia to grant rights, and accord treatment to, New Zealanders and services provided by New Zealanders, no less favourable than those granted or accorded to Australians and services provided by Australians.

THE HIGH COURT DECISION

The majority High Court judgment held that:

- Section 122 must be read with section 160. Accordingly, the ABA must determine standards relating to the Australian content of programs only to the extent that those standards are consistent with the objects of the BSA, the regulatory policy described in section 4, any general policies of the Government notified by the Minister, any directions given by the Minister, and Australia's obligations under a convention or agreement with a foreign country.
- There was nothing in the objects of the BSA which required the ABA to give preferential treatment to Australian nationals over New Zealand nationals in determining standards to be observed by commercial television broadcasting licensees.
- The transmission quota was plainly in breach of Australia's obligations under the Protocol. New Zealand programs had less favourable access rights to the market for television programs than Australian programs. Under the quota Australian programs had an assured market of at least 50%

INSIDE THIS ISSUE

CONTENTS

of broadcasting time (rising to 55% in 1998) while New Zealand programs had to compete with all other programs, including Australian programs, for the balance of broadcasting time.

- The words "relate to" in section 122 are extremely wide. A Standard will relate to the Australian content of programs if it prohibits, regulates, promotes or protects the Australian content of television broadcasts. A Standard can relate to the Australian content of programs although it also regulates other matters. A program will contain Australian content if it shows aspects of life in Australia or the life, work, art, leisure or sporting activities of Australians, if its scenes are or appear to be set in Australia or if it focuses on social, economic or political issues concerning Australia or Australians. However, a Standard made under section 122 is not required to give preference to Australian programs nor does it require that such programs should be under Australian creative control.

Although the High Court held that the transmission quota was unlawful, it was not ruled invalid. The main reason for the finding that the transmission quota was not invalid was the public inconvenience which would result.

According to press reports, the ABA is currently reviewing the Standard and plans to consult with interested parties to develop a number of options for a new program standard which conforms with the High Court decision. The ABA has indicated that one option is to change from an "Australian - produced" program standard to an "Australian - subject matter" program standard. Under this requirement, to gain equal access to the Australian market, television programs (including those from New Zealand) must have Australian subject matter to come within the transmission quota. A discussion paper about standards for Australian content is expected to be released by the ABA around early July.

Jacqueline Brosnan is a lawyer at Blake Dawson Waldron, Sydney office.

STOP PRESS

1998 Communications Research Forum, 24-25 September, Old Parliament House, Canberra

The Communications Research Forum, organised by the Communications Research Unit of the Department of Communications and the Arts (formerly of the Bureau of Transport and Communications Economics) is Australia's premier annual conference on communications policy and research.

A feature of this year's event will be the inaugural award of a $1000 prize for the *Best Student Research Paper*.

For all of the latest information and details on how to register visit the interactive CRF website at www.dca.gov.au/crf or contact Adrian Walker at the BTCE on Tel: 02 6271 1000 Fax: 02 6274 6816 or Email: bseminar@email.dot.gov.au