The Blue Skies Decision and International Law

Extract from a paper presented by the Chairman of the ABA, Professor David Flint, presented a paper at a recent International Law Association conference about the High Court decision and its consequences.

In the "Blue Skies" case, the High Court found that the ABA's requirements for minimum Australian content on commercial TV were unlawful because they conflict with the *Closer Economic Relations* (CER) treaty with New Zealand. It would be useful to say a few words about the economic context before returning to the case and its consequences

THE ECONOMIC CONTEXT

It's worth pointing out that the High Court did not look at the fundamental economic context. It was after all a question of legal interpretation. But economically, it raises a far bigger issue than selling New Zealand TV programs in Australia.

The importance of the US entertainment industry is sometimes overlooked. The value of American entertainment exports is exceeded only by her aerospace exports. And three quarters of the world's television exports are American. This is because of her rich and large domestic market which permits her TV studios to have huge budgets, and to set up an effective worldwide distribution system. This is reinforced because US viewers don't seem to care much for foreign films or TV programs. So a few American firms enjoy the advantage of a highly concentrated market. And unlike France or Argentina, Australia, as an English speaking country, has no natural protection through language.

That said, why shouldn't Australian producers be left to compete with American programs? After all, isn't that what we expect from our manufacturers and our farmers?

The fact is that if an American shoe manufacturer unfairly attempts to sell shoes here at less than cost, Australian producers have a remedy. The American exporter is guilty of dumping.

So it is claimed that in the TV export business, the equivalent of dumping is the norm. Programs are routinely sold below the cost of production. But cost may be the wrong measure. Even in the American domestic market programs are frequently sold at less than cost. That is because selling films, or rather the intellectual property in films, is different from selling shoes. Only restricted rights to use the film are sold - say for a year, and only in a geographic area. In the US, drama typically costs US$1.2 million per hour, and is sold to US networks for US$800,000. A better way to measure dumping may be by reference to this domestic price. Now the best rating US programs sell here for something approaching AUS$30,000 per hour. Price depends on how much the market will pay - in one small Caribbean island US$80 to US $100! So even when Australian TV drama programs cost say one tenth of the US figure, they still cannot compete on price.

THE LAW

Now for the legal context. The making of a binding treaty is a matter for the Crown, i.e. the executive government. It does not require parliamentary approval, although as a matter of courtesy parliament is kept informed or even involved. The only way to give a treaty internal legal effect in Australia is by legislation incorporating the treaty.

Other countries, for example the United States, require parliamentary involvement in treaty making, so that ratification gives both external and internal effect. As a result the US has ratified a substantially lower number of treaties than Australia.

This is not to say that treaties have absolutely no internal effect in Australia. If the common law is unclear, the court may be inclined to find that solution consistent with international law, including treaty law. Three years ago in the *Teoh* case the High Court had astounded observers when it told officials that, before coming to a decision, they must have due regard to any relevant treaties ratified by Australia (there are about 900). Until then, the view was that treaties had no internal effect without legislation. After all, treaties are ratified by the Crown. Any parliamentary involvement, federal or state, is only a matter of courtesy.

In that case the Chief Justice, Sir Anthony Mason, and the present Governor General, Sir William Deane, stated that:

> *"Ratification is not to be dismissed as a merely platitudinous or ineffectual act ....rather (it) is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention ...."* (Mason C J and Deane J)

The legislators disagreed. The decision is being reversed by legislation.

So incorporation by legislation is necessary for a treaty to have any legal effect in Australia. Incorporation can be specific. It can also be done generally, as in s. 299 of the *Radiocommunications Act, 1992*. Alternatively, it can empower a Minister to declare a treaty obligation to be binding (eg. s.366 of the *Telecommunications Act, 1997*).

So we come to the *Broadcasting Services Act, 1992*. Among the objects of the legislation are these:-

> s.3(d) to ensure that Australians have effective control of the more influential broadcasting services; and
>
> (e) to promote the role of broadcasting services in developing and reflecting a sense of *Australian identity, character and cultural diversity;* and
>
> (g) to encourage providers of commercial and community broadcasting services to be responsive

to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance".

Section 122 specifically provides that the ABA must:-

determine standards that are to be observed by commercial television broadcasting licensees

These are to relate to programs for children; and the Australian content of programs (s.122).

THE AUSTRALIAN CONTENT STANDARD

Under this an *Australian Content Standard* was developed to take effect from 1 January 1996, replacing an earlier standard. Its principle requirement is that at least 55% of commercial television broadcasting between 6pm and midnight be Australian programs. There are also subquotas for children's programs and drama.

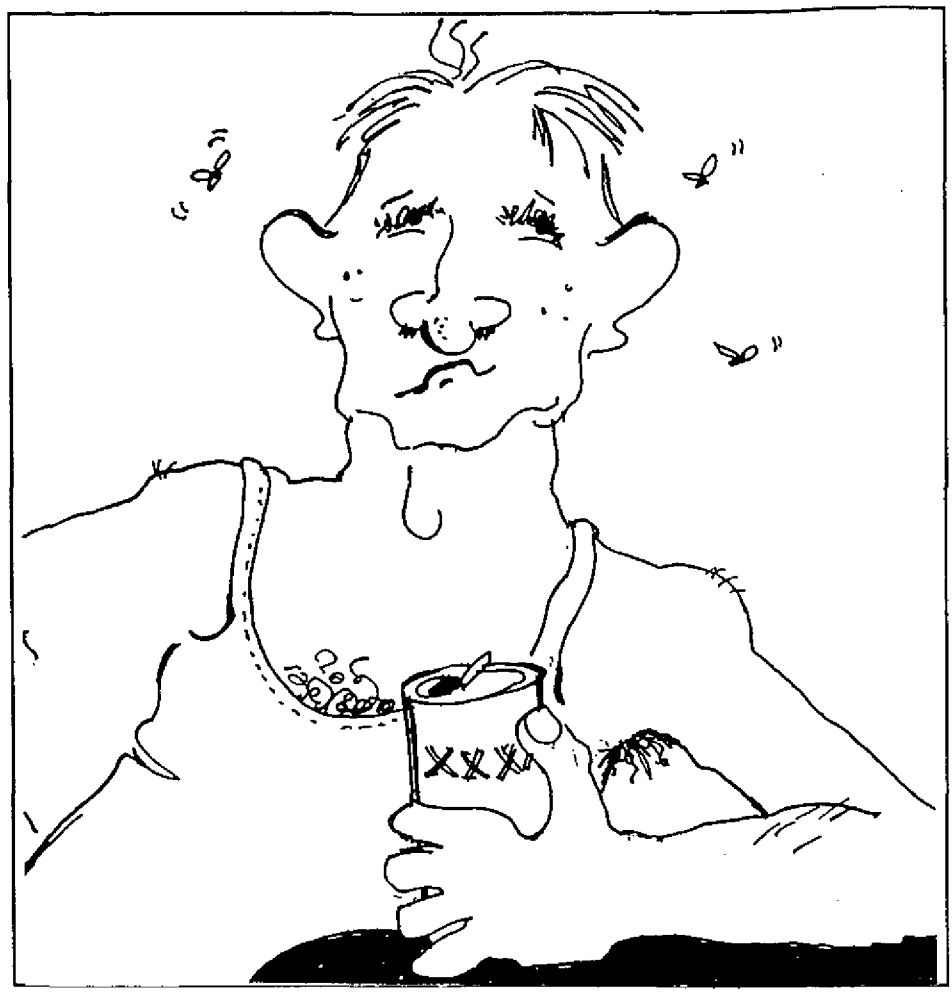
Clauses 5 and 7 define "an Australian program" as one that was "produced under the creative control of Australians who ensure an Australian perspective...."

The principle form of program allowable under the standard is one where Australians are primarily responsible. In addition the program must be produced or post produced in Australia, unless this is impractical.

So there is a clear mandate to require Australian programs. But tucked away towards the end of the Act in section 160 is a requirement that the ABA is 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.

Well how do you relate what seems to be an insignificant provision against the object of promoting the role of broadcasting in developing and reflecting a sense of Australian identity, character and diversity, and in mandating a local content standard?

Now the CER with New Zealand requires that each Member State shall grant to persons of the other Member State and services provided by them access rights and treatment in its market no less



favourable than those allowed to its own persons and services provided by them.

Whatever did the government and Parliament intend in 1992? In the Explanatory Memorandum, the Minister was quite explicit:

> *It requires the ABA to perform its functions in a manner consistent with various matters, including Australia's international obligations or agreements such as Closer Economic Relations with New Zealand.*

And the Minister wrote to the ABA on 2/12/92 expressing his concerns that the former standard may have been in breach of the CER.

THE CASE

Being dissatisfied with the Australian standard, New Zealand interests took the ABA to court. The trial judge agreed with them, but the full Federal Court found the ABA standard lawful:-

> *"Parliament has given the ABA two mutually inconsistent instructions. It has said, first, that the ABA is to provide for preferential treatment of Australian programs, but, second, that it is to do so even-handedly as between Australia and New Zealand."* (Wilcox & Finn JJ).

The High Court disagreed. And they were unanimous, except that the Chief Justice thought the standard illegal, and therefore of no effect, while the majority held it unlawful. This means the ABA must, by revision or replacement, ensure a lawful standard.

> *"With great respect to their Honors, the parliament has done no such thing. The parliament has not said that the ABA must give preferential treatment to Australian programs. It has said that the ABA must determine standards that "relate to.... the Australian content of programs". The words "relate to" are extremely wide. They require the existence of a connection or association.*
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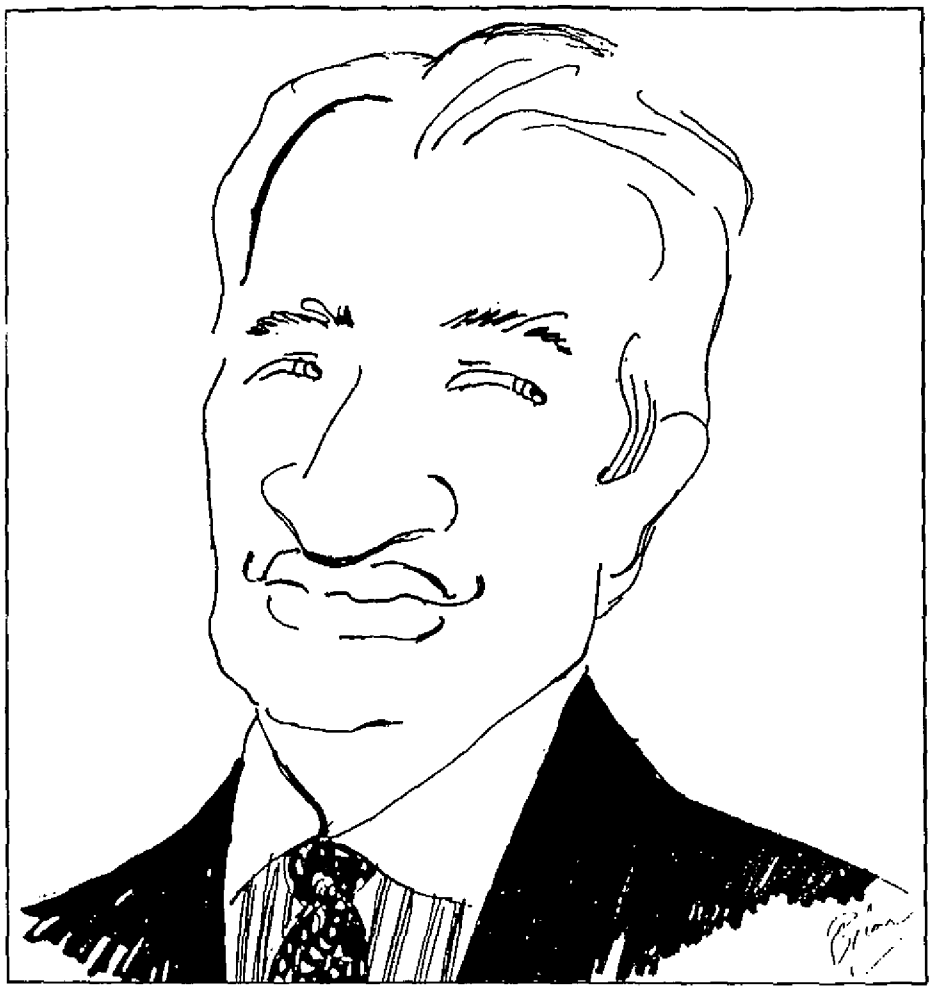
> *Nor is there anything in the act - including the combined effect of s.160 and the trade agreement - which prevents the ABA from determining a standard relating to the Australian*



content of programs" (McHugh, Gummow, Kirby & Hayne JJ)

The High Court did express some sympathy with the ABA, pointing out that Australia has 900 treaties. Will there, for example, be a flow-on from the CER to the NARA treaty with Japan? Other treaties may be relevant, even the *Convention on the Rights of the Child*, which protects a child's right to freedom of expression.

Of course Parliament could now change s.160 (d). But it would probably have a major diplomatic battle on its hands. Ironically, one it would not have had if the legislation had been framed differently in 1992. Perhaps s. 160(d) could be limited to the CER. But that is a matter for Parliament.

A NEW STANDARD - THE OPTIONS

So the ABA must develop a new (or revised) standard. The ABA proposes to issue a Discussion Paper on which it will write submissions and hold consultations before a new or revised standard is issued.

One option, the most simple, is to extend the current standard to New Zealanders. Another is to have two quotas, one Australian and one New Zealand. For example, requiring 30% of every station's programs to be Australian, and 30% New Zealander. This would be most beneficial for the New Zealand industry. Would broadcasters and more importantly viewers want this?

Yet another is an "Australian look" test. The Court hinted at a resolution:

> *"...Australian content of programs in s.122 is a flexible expression that includes, inter alia, matter that reflects Australian identity, character and culture 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 or 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"*

Other tests could be based on expenditure, on whether a program is a first release, or on a mixture of various tests.

THE CULTURAL EXCEPTION

Is international trade in culture no different from say international trade in shoes or computers. Should the same rules apply?

There are those who say there is a difference. That culture goes to the hearts and souls of people. That it is too important not to be treated differently.

It is true that for a long time national cultures - at least from the coming of talking pictures - were protected from Hollywood. But let us not forget that that quaint essentially American town is the creation of mainly Jewish European immigrants who found themselves on the periphery of American culture.

In any event, technology has overcome the natural protection of language, and everywhere American cinema and TV programming seems triumphant. Three quarters of the world is TV reports are American. Next to aerospace, entertainment is her largest export industry.

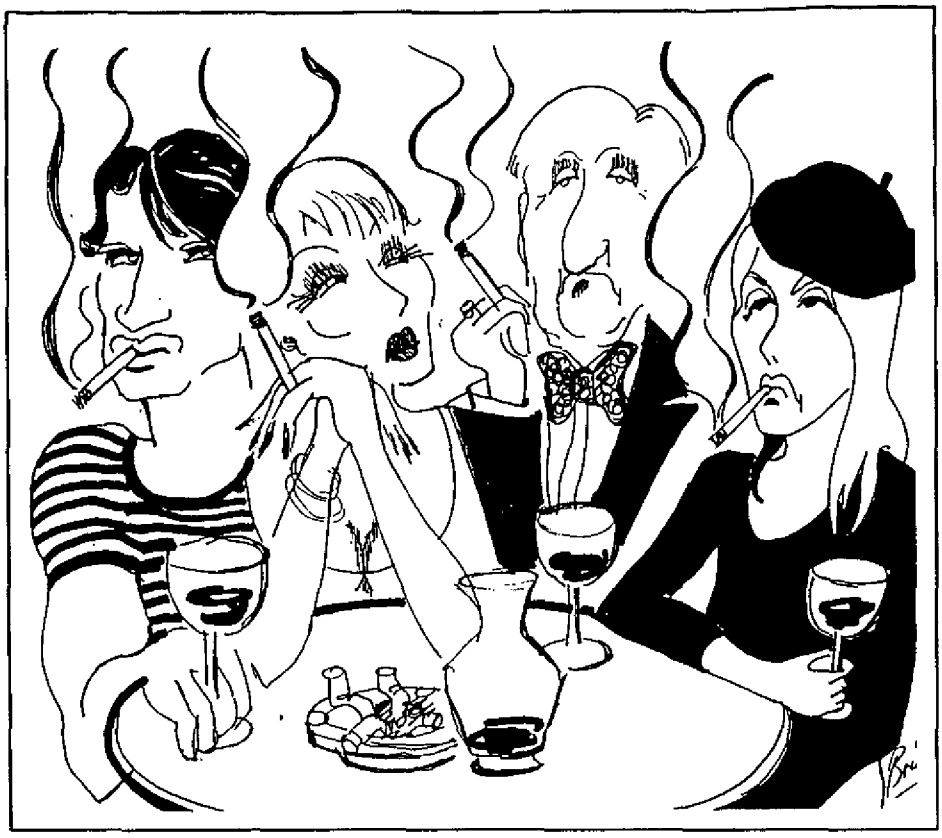
As an essentially European civilisation, which shares many of the same values, and speaks the same language, Australia would seem to be more susceptible to US cultural imports than most.

Yet it has been France and Canada who have made the most of the running in proposing that cultural industries be excepted from developing international trade law.

In the Uruguay Round the US sought, without success, to have the protective *European Union 'Television sans frontieres' Directive* declared contrary to the provisions of the GATS. France sought, also without success, to have a cultural exception declared. Under the GATS member states themselves choose which industries ("sectors") they wish to include in their offers of national treatment. Therefore, those who want to exempt their cultural industries are in the stronger position.

Notwithstanding the US position in the GATS, the *US Canada Free Trade Agreement of 1989*, as well as NAFTA, exclude 'cultural industries' - no doubt due to Canadian insistence. The US administration can be expected to campaign against a cultural exemption in future negotiations.

The question of a cultural exemption was put on the agenda of the London based International Law Association the 68th conference of the International Law Association, held in Taipei, Republic of China, 24-30 May 1998. It recommended that its Cultural Heritage Committee prepare a "blueprint" for the future development of cultural heritage law, in particular by establishing what aspects need further development, in what way, and by whom; noting, for example, that one such area would involve a study of the "cultural exemption" from international economic agreements, which might produce a set of recommendations designed to advance consideration of the way states may promote their industries which are relevant to their cultural heritage consistent with their obligations under international law; and emphasising that this work proceed in consultation and cooperation with other International Law Association committees as appropriate.



THE FRENCH EXPERIENCE

But I should not leave you to conclude that all is rosy at the heart of cultural protection, France. In a blistering exposé timed to coincide with the Cannes Film Festival, *The European* of 18-24 May 1998 claimed that while EU annual subsidies for film exceed US$850 million... but that only half of the 700 EU films made get a cinema showing.

It claimed there was clear correlation between the size of the subsidy and the degree a French film will bomb at the box office. 85% of French film directors, it said, are over 50, and subsidies have not stopped a 50% decline in French cinema audiences.

Yet the official response in France and elsewhere in Europe is to demand even more subsidy and protection.

The European reported that actress Sophie Marceau gave this reason for going to work in Hollywood:

> *"French films follow a basic formula:*
>
> *Husband sleeps with Jeanne because Bernadette cuckolded him by sleeping with Christophe and in the end they all go off to a restaurant.*
>
> *How many times can you act in that kind of film?"*

As Paul Johnson argued recently (*Spectator*, 2 May 1998):

> *"No one has done more than the French, in the last half-century, to guard their culture from invasion, and they have spent more per capita on the arts than any other country on earth; but can anyone name an outstanding French novelist, poet, painter, composer, playwright or architect of today?"*

Professor David Flint is the Chairman of the Australian Broadcasting Authority.