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International obligations strike again

The capacity for the effect of conventions and other international agreements entered into by Australia to affect the operation of domestic legislation has been noted previously in relation to persons who seek to be treated as refugees. See the legislation column in (1995) 3 *ALL* 116 and (1995) 3 *ALL* 239 for references to *Minister for Immigration and Ethnic Affairs v Teoh (1995) 124 ALR 353*. The same issue has arisen again in another context. The court's ruling produced the seemingly curious result that television programs made in New Zealand are in effect to be considered as if they were Australian content for the purposes of the standards set by the Australian Broadcasting Authority (ABA).

The Broadcasting Services Act 1992 (Cth) in section 122 requires the ABA to set standards to be observed by commercial television stations as to "the Australian content of programs". In pursuance of this duty the ABA published the Australian Content Standard (the Standard) on 15 December 1995. In broad terms the Standard provided that 50% of all programming broadcast between 6.00 am and midnight must be "Australian programs". The Standard defined "an Australian program" in clause 7, in part, as being a program that "is produced under the creative control of Australians who ensure an Australian perspective, as only evidenced by the program's compliance with subclause (2), subclause (3) or subclause (4)". Subclause 7(4) required, inter alia, that:

- the producer or producers must be Australian; and
- either the director (or directors) or the writer (or writers) must be Australian; and
- not less than 50% of the leading actors or on-screen presenters must be Australians.

On 21 September 1995, however, the Australian and New Zealand Governments had entered into the Protocol on Trade and Services (the Protocol) in pursuance of Australia and New Zealand Closer Economic Relations - Trade Agreement. Article 5 of the Protocol provided:

> "Each Member State shall accord to persons of the other Member State and services provided by them treatment no less favourable than that accorded in like circumstances to its persons and services provided by them."

The Standard clearly disadvantaged New Zealand programs in comparison with Australian programs.

Paragraph 160(d) of the *Broadcasting Services Act 1992 (Cth)* required the ABA to perform its functions in a manner consistent with Australia's obligations under any convention to which it was a party.

In *Project Blue Sky Inc v Australian Broadcasting Authority* (unreported - Federal Court, 2 August 1996) some New Zealand companies involved in the production of television programs sought a declaration that the Standard was invalid. In granting the declaration Davies J held that, while the ABA could not have defined "Australian program" to include a New Zealand program, it could have drafted the Standard so that it complied with the Protocol and thereby have complied with paragraph 160(d) of the *Broadcasting Services Act 1992 (Cth)*. One means would have been for the Standard to provide that the obligation to broadcast Australian programs was reduced to the extent that New Zealand programs were broadcast.

It seems that the day may be approaching when every good legal library will need to have immediate access to the *Australian Treaty Series*.

The coming together continues

Meanwhile the growing relationship between Australia and New Zealand took another step with the signing in June and July this year of the Trans-Tasman Mutual Recognition Arrangement. A principal effect of the Arrangement is that, subject to a range of exceptions including quarantine, indecent material, firearms and therapeutic goods, any goods that may lawfully be sold in one country may be sold in the other despite differences in product standards. The second key provision in the Arrangement permits a person entitled to practise an occupation in one country, to practise it in the other.

Government enterprises and competition

Another major legislative change has been the extension of the operation of the *Trade Practices Act 1974 (Cth)* to all Australian businesses, including government business enterprises. All States and Territories, except Western Australia, have passed legislation applying the Act to businesses beyond the

scope of Commonwealth legislative power Until July 1997, government business enterprises will not be subject to the pecuniary penalty provisions, but injunctions and orders for damages are possible.

Olympian protection

No, legislation for public safety and to prevent terrorism in 2000 has not been introduced The Commonwealth Parliament has, however, enacted the *Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Cth)* in order to provide protection to those who obtain licences to use words and symbols associated with the Sydney 2000 Olympic Games In addition to a range of remedies available under that statute, the Act specifically preserves the remedies available under the *Trade Practices Act 1974 (Cth)* for misleading and deceptive conduct

Limitation of joint and several liability

In July 1996, draft legislation intended to limit the amount of a person's liability where there is joint and several liability was released for public comment The draft legislation was produced by a joint exercise between the Commonwealth and NSW Governments Partly at least the product of the actions for damages arising out of the corporate collapses of the 1980s, the draft legislation permits a court to limit the extent of the judgment that may be given against a defendant to an amount that reflects "that portion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage." The particular concern was professional liability and does not apply to claims arising out of personal injury

Use of extrinsic material in construing statutes

In an earlier column (ALL 4(2) July 1996) the decisions of Lindgren J in *Deloitte Touche Tohmatsu v Australian Securities Commission*[1] was noted. His Honour had used extrinsic material - namely, a number of Parliamentary and other public reports to read into section 50 of the ASC Law, a limitation on the ASC's power to begin and to carry on a proceeding in the name of a company that was not specifically provided for in the section.

The Full Court of the Federal Court has now published its judgment on the ASC's appeal from the judgment of Lindgren J[2]. The Full Court allowed the appeal and held that the limitation that Lindgren J had identified should not be inferred into section 50. In a joint judgment Beaumont, Drummond and Sundberg JJ said[3]:

> "There is nothing express in the language of s.50 to indicate that its operation was limited to situations where the board [of the company's directors] concurred in the institution of the proceedings Logic and experience of the kind discussed in the Eggleston report[4], would suggest the contrary".

The Full Court said that the purpose of the legislation was remedial and accordingly should not be interpreted so as to import the complex and "sophisticated" concepts associated with the rule in *Foss v Harbottle*[5].

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[1] (1995) 54 FCR 562 and (1996) 136 ALR 453

[2] Unreported as the time of publication (Full Court - 28 August 1996)

[3] At page 66

[4] Third Interim Report of the Company Law Advisory Committee to the Standing Committee of Attorneys General on the Investigations Provisions of the Uniform Companies Acts in June 1969

[5] At page 66