Project Blue Sky: ABA wins content appeal; Project Blue Sky granted leave to appeal

Lesley Osborne & Cathy Bishop outline developments in the Project Blue Sky litigation following the grant of leave to appeal to the High Court.

In a judgment handed down on 12 December 1996, the Full Federal Court upheld the ABA's appeal against the recent Federal Court decision about its Australian content standard. A single judge of the Federal Court had ruled that the ABA's Australian content standard for commercial television was invalid in so far as it did not include New Zealand programs. [See CLB Vol 15 No. 4 1996, p26 for comment by Angus Henderson and Michelle Kelly: Ed.]

Project Blue Sky Inc., and other parties, representing the New Zealand film and television production industry, were granted leave to appeal to the High Court from the Full Federal Court's decision. Pending the outcome of the appeal, the ABA's existing Australian Content Standard will remain in force.

The Protocol

Australia and New Zealand signed a Protocol on Trade in Services (the Protocol) to the Closer Economic Relations Agreement (CER) in 1988. The Protocol provides at Article 5 that 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 Protocol also requires at Article 4 that the Member State shall grant to persons of the other Member State and services provided by them access rights in its market no less favourable than those allowed to its own persons and services provided by them.

Section 160(d) of the Broadcasting Services Act 1992 (BSA) requires the ABA to perform its functions in a manner consistent with Australia's obligations under any convention to which Australia is a party. The ABA acknowledges that the CER and Protocol come within section 160(d).

The Australian Content Standard - 'Australian program'

The Australian Content Standard determined by the ABA under section 122 of the BSA came into force on 1 January 1996. The ABA defined 'Australian program' to mean a program produced under the creative control of Australians who ensure an Australian perspective.

The applicability of the Protocol to the ABA's determination of the Australian Content Standard was considered by the Full Federal Court on appeal from the judgment of Davies J in the *Project Blue Sky* litigation. The Full Court overturned the judgment of Davies J who held that the ABA must provide national treatment to New Zealanders, but that 'Australian' did not include 'New Zealand'. The mechanism which Davies J proposed for giving effect to the CER in the Standard was that the obligation to broadcast Australian programs would be reduced to the extent that New Zealand programs were broadcast.

Reasons of the Full Federal Court

The Full Court found in the ABA's favour by a majority of two to one. Justices Wilcox and Finn allowed the ABA's appeal with Justice Northrop dissenting.

The Full Federal Court held that the ABA, in sections 122 and 160(d), was faced with conflicting Parliamentary instructions which could not be reconciled in the manner suggested by Davies J, or in any way. The Full Court resolved the statutory conflict by reference to the well known principle that where a specific provision conflicts with a general provision, the specific provision must prevail. Thus, the provisions of section 122 were exempt from compliance with section 160(d) insofar as that section requires the ABA to comply with the CER.

'Australia and New Zealand have much in common: geography, history, ethnic background, language and culture.' Wilcox and Finn JJ said in their reasons for judgement, 'The two countries have shared the vicissitudes of peace and war. Their peoples are perhaps as close as the peoples of any two countries can be. Yet New Zealand is not Australia and a New Zealand program is not an Australian program.

'The only standard the ABA could set, consistent with the (CER) Protocol, would be one which allowed for there to be no Australian content programs at all, provided that New Zealand programs were broadcast in lieu of programs having Australian content. While one may be able to describe this as determining a standard, it is not one that puts into effect the statutory obligation to determine a standard that relates to the Australian content of programs,' Their Honours said.

Thus, the Full Court has made clear the pre-eminence of the specific cultural objective in the *Broadcasting Services Act* over the general obligations under the CER Agreement.

Special Leave application

In the High Court special leave application the applicants argued that the ABA breached its international obligations under the *Broadcasting Services Act 1992*[1]. The ABA's argument is that it is faced with conflicting provisions in the Act, and that this conflict can be resolved by giving precedence to the specific provision relating to the determination of the Australian Content Standard, rather than the general provision regarding compliance by the ABA with international treaty obligations.

History of the appeal

In September 1995, the ABA concluded a wide-ranging public review of the Australian content requirements for commercial television. The new Australian Content Standard and variations to the Children's Television Standards, which came into effect on 1 January 1996, are the result of this extensive consultation by the ABA.

The Australian Content Standard for commercial television requires the transmission of Australian made programs and minimum levels of

Australian preschool programs, children's drama, adult drama, and documentaries.

In its review the ABA came to the conclusion that there was a real legal impediment to the recognition of New Zealand persons and programs in the standard. The definition of 'Australian program', for the purposes of the Australian Content Standard, does not include programming produced by New Zealanders.

Project Blue Sky Inc., representing the New Zealand film and television production industry, took the view that the ABA's standard contravened Australia's treaty obligations under the CER Agreement by not according national treatment to New Zealand programs.

In his ruling of 2 August 1996, Justice Davies indicated the ABA cannot include New Zealand persons or programs as Australian for the purpose of the Australian Content Standard. His Honour said it was, however, otherwise open to the ABA to determine a standard which is consistent with the Protocol on Trade in Services (the Protocol) of the Australia New Zealand Closer Economic Relations Ñ Trade Agreement (CER Agreement). In its notice of appeal the ABA sought a review of that ruling.

The ABA's appeal was heard before the Full Court of the Federal Court in Canberra on Friday 1 November.

Cathy Bishop is a Senior Lawyer with the Australian Broadcasting Authority, and had carriage of the Project Blue Sky litigation on the ABA's behalf. Lesley Osborne is Manager, Standards, ABA. Standards is the area of the ABA responsible for Australian content regulation on free to air and pay television. The views expressed are those of the authors, not of the ABA.

Copyright Review

A Note On The Formation Of An Inter-departmental Committee To Deal With The Issues Of Collecting Societies

The report by Professor Shane Simpson for the Commonwealth government on the collective administration of intellectual property rights in Australia has prompted formation of an IDC, headed by the Department of Communications and the ARts, and including Treasury, Attorney-General's Department and ACCC representatives. The ACCC is dealing separately with APRA's applications for authorisation and notification in relation to its standing arrangements for the acquisition and licensing of the performing rights in its music repertoire, for distribution of funds to members and with overseas collecting societies.

The ACCC's draft determination contains proposals that authorisation be granted for a period of 4 years for the "input and output arrangements" excluding live public performance rights "provided that APRA sets up an independent appeal mechanism for users". With respect to live public performance and broadcast rights, the ACCC proposed in its October 1996 draft determination that authorisation not be granted unless and until a range of issues can be resolved to the satisfaction of the Commission. The issues identified relate to assignment of rights in all works present and future, opting out provisions, and membership withdrawal notice being reduced from three years to six months. These matters have all been subject to criticism from parties opposing APRA's applications.

Against this background, a roundtable on the Simpson report was held in Canberra in December 1996, involving IDC participants and a broadly based group of copyright users, drawn from broadcasting, small business, book and other print publishers, academia, librarians and others. An opening presentation from Mr Peter Drahos (Law Faculty, ANU) commented on price and access as core issues, with access or permission formulated under three model approaches: negotiation, statutory and compulsory licensing.

Mr Drahos indicated some preference for statutory licensing. The Simpson Report had recommended statutory rights for educational institutions to reproduce artistic works but not for multi-media exploitation (Recommendations 15 and 16). Mr Drahos suggested that reform areas included the reduction in the number of collecting societies and the ned for a stronger Copyright Tribunal and more guidance on conduct. References to "webs of control" were taken up by other participants with a discussion on the merits of a Copyright Ombudsman being created - one of the 106 recommendations of the Simpson Report.

The meeting demonstrated that there was dissatisfaction with the current role and performance of collecting societies. The Simpson report identifies several areas for management reform, including development of IT operations, election procedures, sampling and budgeting. Commenting specifically on the role of the ACCC, Profession Simpson recommended that it be consulted so that "guidelines be drawn up and approval mechanisms instituted, by which those collecting societies which can demonstrate that their structures, procedures, functions and conduct is within those guidelines, are accorded the status of Qualified Societies"which can retain the protection of s 51(3) of the Trade Practices Act 1974.

Broadcasting industry representatives were critical of the Simpson report recommendations that "undistributable funds" be allocated to cultural purposes. It was stated that any funds not distributed evidenced over collection and should be rebated to users. Other criticisms of collecting societies related to non-payment or underpayment to certain copyright owners. The complaint from small business users was that the collecting societies were over-zealous in their fee raising efforts, were self-interested and some at least were inefficient (in line with the Simpson Report observations and recommendation that one organisation should "make an effort to reduce administrative costs to 30% of revenue").

The recommendation which potentially carries the most far-reaching implications for the role, function and existence of collecting societies is that "as a matter of urgency, further study be made of the impact of new technologies on copyright collecting societies and potential new methods of collection." It remains to be seen precisely how this recommendation will be implemented.