Blue Sky: reconciling the obligations with the requirements

Is it time to repeal section 160 (d) of the Broadcasting Services Act to save Australia's content standard? Marion Jacka of the Australian Film Commission's Policy Unit outlines the production industry's proposals

In recent weeks the Australian production industry has been grappling with the issue of how, and indeed, whether, the Australian content standard should be revised given the High Court decision in the Project Blue Sky case.

The Australian Broadcasting Authority (ABA) has been given the task of reconciling its obligations under the *Broadcasting Services Act* in respect to Australian content ,with the requirement, given s160 (d) and the Closer Economic Relations Treaty (CER) with New Zealand, to accommodate New Zealand programs in the Australian content standard.

The ABA issued a discussion paper in July outlining a wide range of options for how the standard might be reviewed. (see **Communications Update**, issue 146, July 1998, page 8).

Several industry groups have combined to present a joint submission. This submission argues at the outset that there is a basic contradiction in the exercise, that the differences between the trade obligations of CER and the cultural policy objectives of the Act are irreconcilable, and that the only real solution is the repeal of s160 (d).

The industry group will press this point in its submission to the Senate Inquiry which is looking at the implications of retaining, repealing or amending paragraph s160(d).

In its response to the ABA discussion paper, the production group stresses the cultural objectives of the Act and warns that there is a real danger of these being undermined by a revised standard.

The submission discusses the current "state of play" with Australian content pointing to the minimal levels required in the areas of adult drama, documentary and children's drama, and the reductions in hours of Australian drama over recent years. This situation will be exacerbated with the demise of the Commercial Television Production Fund at the end of this year. The submission also includes an examination of the New Zealand industry with information on the amount and types of programming available and the differing subsidy arrangements that apply.

The submission argues that rather than creating a "level playing field" as the Project Blue Sky rhetoric would have it, the High Court decision actually puts Australian programs at a significant disadvantage. New Zealand programs will inevitably always be cheaper because they are selling to a secondary market and accordingly attractive to the networks as "quota fillers". In addition, there is a significant amount of back catalogue New Zealand material.

The most vulnerable areas are those of adult drama, documentaries and children's drama. The minimum hours required in these areas are very low, making them extremely vulnerable to displacement by New Zealand material.

The submission argues that the requirement to accommodate New Zealand programs creates major distortions in the underlying principles and operation of the Australian content standard.

Therefore to maintain the integrity of the cultural objectives of the Act, wide-ranging measures are necessary.

The main elements of the package presented are as follows:

1. Reduced time bands

The current time band for drama is between 5pm and 12 midnight. For documentary (where the quota is 10 hours a year), it is 6am to midnight. We have proposed that the time bands for both be from 6pm to 10.30pm. This aligns with prime time viewing and would go some way to counter the temptation for networks to use cheap New Zealand material on the edges of the current time bands.

2. An expenditure requirement

The submission proposes an expenditure requirement apply to adult drama, documentary and children's drama. This would mean to qualify for quota a program would have to have network/broadcaster expenditure of a certain amount. The levels proposed are at the lower end of current Australian licence fees. This aspect of the package is considered crucial to put Australian and New

... continued on page 19

Content Standard

...continued from page 6

Zealand programs on the same footing where they will be competing on quality not price.

3. First release

The current definition of first release means all back catalogue New Zealand material could count as first release here. The position taken in the submission is that programs which have already been shown in the "common market" of Australia and New Zealand should not qualify as first release.

4. Subsidy levels - series and serials

A major difference between the two countries is that series and serials receive subsidy in New Zealand but don't (except for small amounts of state subsidy) in Australia. To redress the imbalance we propose that series and serials in receipt of certain levels of subsidy should not be eligible for quota.

5. A revised creative elements test

The submission argues for the strengthening of the current creative elements test. Specifically it proposes a new element - that the program must be originated and developed in Australia and that all key creative/managerial decisions including the initiation of the program and the hiring of director/writer/producer must be made by Australians (or New Zealanders). This is necessary for two reasons:

- to ensure that any New Zealand programs that qualify are genuinely New Zealand and not foreign with some local elements;
- given the reduction in Australian programming that will occur, to ensure the integrity of the remaining Australian programming.

6. Removing 10BA as a gateway for quota eligibility

Under the current standard, programs with a 10BA certificate automatically qualify as Australian content . Maintaining this would require providing an equivalent New Zealand film tax gateway. Like 10BA, the New Zealand provisions allow for wide discretion of concern given officials in Wellington would be deciding eligibility for access to the Australian standard. The removal of 10BA would not disqualify Australian programs with a certificate - it would just mean all programs (except official Australian co-productions) would be assessed against the one creative elements test.

7. Official co-productions

The question here is whether official New Zealand/third party co-productions have to be considered eligible. (Currently official Australian/third party co-productions are given full Australian status). The ABA is firmly of the view that this is not required.

Further, we understand the New Zealand government is sympathetic to Australian concerns on this point. But there may still be a need to revisit this issue.

8. How to include New Zealand in the quotas

The submission endorses a single quota satisfied by a separate but parallel creative elements test for New Zealand. The alternative raised by the ABA was separate quota requirements for Australian and New Zealand programs. This is rejected as it would clearly mean conceding "ground" at the outset to a certain proportion of the quota being occupied by New Zealand programs.

Taken together these elements involve wide-ranging changes to the standard and some aspects, for example, the expenditure requirement, will be controversial. But the group is emphatic that modest "tinkering" around the edges will not be sufficient to ensure the current minimum levels of Australian programming are maintained.

The next stage

The ABA has indicated it may release a further paper before moving to a draft standard with the objective of having the revised standard in place from January 1,1999.

The Senate Inquiry process continues, notwithstanding the forthcoming federal election. We understand the committee is intending to start conducting hearings soon after October 3, 1998.

Submissions to the ABA inquiry are available on the ABA website: www.aba.gov.au

Marion Jacka

Book Review

...continued from page 23

is a function of internal factors in each media organisation.

So what is the point of a book like this? While it doesn't attempt to map out a framework for legislative reform, the authors draw out some helpful perspectives for policy makers, at least from one side of the debate. Despite some obvious shortcomings in the raw data (which the authors point to as a necessary consequence of collecting essentially confidential and strategic information) Libel and the Media gives tangible insights into otherwise speculative perceptions about media behaviour.

In April this year, Australia's Commonwealth Attorney General Darryl Williams signalled that the States had again failed to agree on a path to uniformity of Australian defamation law and called for a "fresh approach," without saying what that might involve. A comparable study of the practical consequences of Australian defamation law may just be a good starting point.

And now for the American perspective: insights on the First Amendment

The Communications Law Centre was fortunate to host a recent discussion forum for Professor Fred Schauer and a group of leading Sydney media law specialists. Prof Schauer is the Frank Stanton Professor of the First Amendment at Harvard and has generated a prolific body of ground-breaking theoretical and empirical work on the First Amendment. He is currently examining the practical impact on media reporting before and after an early U.S. precursor of the New York Times v Sullivan "public figure" case, by comparing media content. Preliminary work suggests the impact of defamation laws on media reporting may not be a simple exercise in cause and effect.

Julie Eisenberg