

Australia's Treaty Obligations and the Broadcasting Services Act 1992

Cathy Bishop discusses the impact on the ABA's functions of Australia's international obligations under the International Covenant on Civil & Political Rights (ICCPR) & the Convention on the Rights of the Child.

Introduction

Section 160(d) of the *Broadcasting Services Act 1992* (the BSA) states:

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.

Object 3(e) of the BSA provides that one of the objects at the BSA is to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity.

Two treaties which may apply to the ABA pursuant to section 160(d) of the BSA are the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child. This article discusses the relevant provisions of these treaties and examines how they interact with functions of the ABA and object 3(e) of the BSA.

The ICCPR

The ICCPR was ratified by Australia in 1980². The Preamble to the Covenant provides:

The States Parties to the present Covenant,

.....

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

.....

Agree upon the following articles. (emphasis added)

It is of immediate interest that the Covenant is intended to affect 'social and cultural rights'. Such rights are part of the administrative burden placed on the ABA under Part 9 of the BSA. This statement signals the possibility that the Covenant will impact on the ABA's functions, and so must be examined more closely.

Part 9 of the BSA relates to program standards. Section 122 is titled 'Program standards for children's programs and Australian content', and provides as follows:

122.(1) The ABA must, by notice in writing:

(a) determine standards that are to be observed by commercial television broadcasting licensees; and

(b) determine standards that are to be observed by community television broadcasting licensees.

(2) Standards under subsection (1) for commercial television broadcasting licensees are to relate to:

(a) programs for children; and

(b) the Australian content of programs.

(3) Standards under subsection (1) for community television broadcasting licensees are to relate to programs for children.

(4) Standards must not be inconsistent with this Act or the regulations.

Pursuant to subparagraph 122(1)(a), the ABA determined the Australian Content Standard³ which regulates the

level of Australian programming, including drama programs, on commercial television, and varied the Children's Television Standards⁴. The Children's Television Standards regulate the type and duration of children's programming and provide for certain minimum levels of programs suitable for children and preschool children (including drama programs designed for children) which must be shown on commercial television.

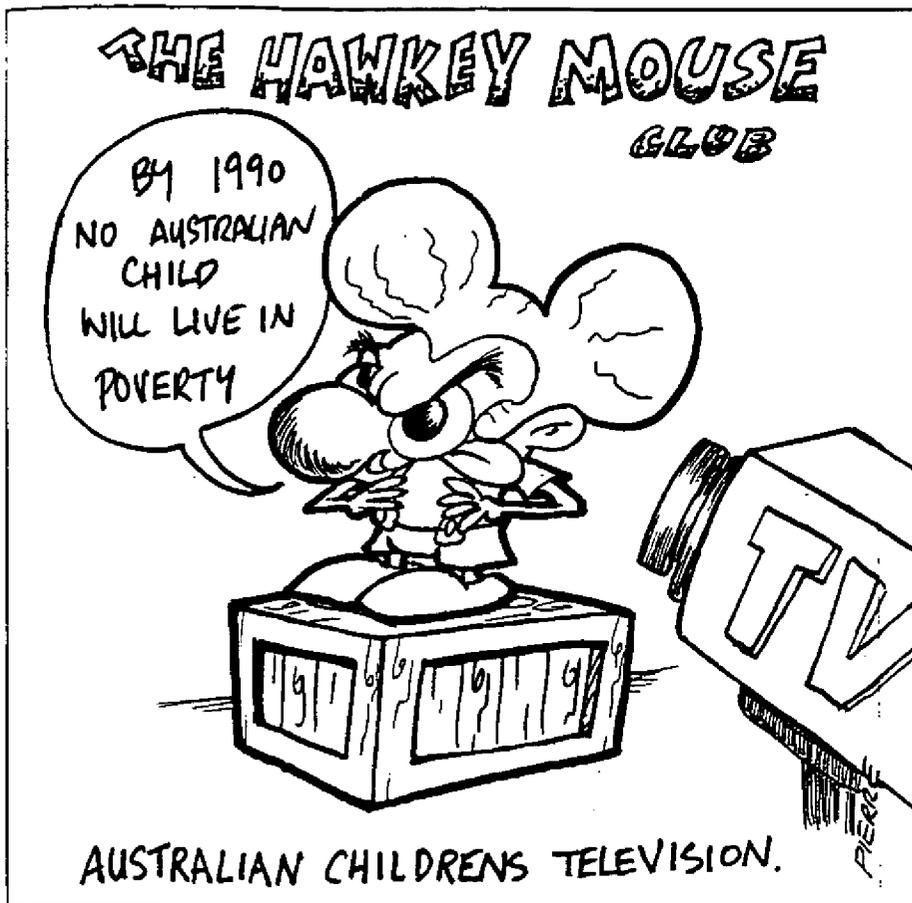
Compliance with the section 122 standards is a condition of the licence of commercial television licensees: Schedule 2 to the BSA, clause 7(1)(b). Compliance is monitored by the ABA. A licensee who fails to meet the requirements of the standards is in breach of its licence: in this situation, the BSA provides a range of measures which may be taken by the ABA to ensure compliance.

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (emphasis added)

This Article may have some application to object 3(e) of the BSA. This object was relied on by the ABA in developing an Australian content standard under Part 9 of the BSA.

My view is that where the ICCPR or the Convention on the Rights of the Child advocate the promotion of cultural objectives, the ABA should be guided in the final analysis by object 3(e) of the BSA. To the extent that the Conventions conflict with this object, the ABA is entitled to regard the Conventions as not incorporated into domestic law. This principle was affirmed by the High Court in *Teoh*: 'alteration of the law falls within the province of Parliament, not the Executive'⁵. Where a specific instruction



The Preamble conveys that the Convention is intended to affect the rights of the child to participate in 'life in society', cultural expression and to special care and assistance. From the other Articles of the Convention, it appears that the expression 'life in society' may include the right to freedom of speech. These will impact on the ABA's development of a standard relating to programs for children, pursuant to section 122(2)(a) as set out above.

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29; [Article 29 relates to the education of the child]

(b) Encourage international co-operation in the production, exchange and

dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18. (emphasis added)

from Parliament such as 3(e), conflicts with an instruction of the executive (a treaty) as incorporated by a general provision such as 160(d), the specific Parliamentary instruction must override the general instruction, and its incorporation of the objects of international conventions which conflict with objects which have been sanctioned by Parliament. This was confirmed by the majority Full Federal Court in Project Blue Sky⁶.

In any event, my view is that there is no conflict between Article 1 of the ICCPR and object 3(e) of the BSA. In fact, Article 1 supports the objective in 3(e). Article 1 refers to the right of peoples to pursue 'their' cultural development. In an Australian context, the right referred to is surely the right of Australians to pursue the cultural development of Australians: this is the intent of object 3(e). Thus, Article 1 is incorporated by virtue of section 160(d), and pursuant to that Article and object 3(e), the ABA is required to promote the social and cultural development of Australians (how the Australian content standard achieves this is discussed below in relation to the Convention on the Rights of the Child).

The Convention on the Rights of the Child

The Convention on the Rights of the Child was considered by the High Court in Teoh⁷. The relevant Articles, and a discussion of their impact on the ABA's functions which relate to object 3(e) of the BSA, are set out below:

The Preamble states:

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

...
Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

...
Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State. (emphasis added)

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 17(a) arguably requires the Standards to perform an educative role (in accordance with Article 29), and to develop the cultural identity of the child (see also Article 29(1)(c)) and Article 17(b) requires the ABA to promote cultural diversity.

It is arguable that Article 17 is incorporated into the BSA, to the extent that it does not conflict with object 3(e). It is arguable that in a domestic context, Article 17 should be read as applying to the cultural identity and cultural diversity appropriate in that domestic context. Article 29(1)(c) supports this reading. In that event, there is no conflict between object 3(e) and Article 17, and thus the ABA is required by object 3(e) and the Convention (particularly Articles 17, 29(1)(c), and 31) to promote cultural diversity and identity.

The objectives of these Articles are promoted through the children's drama requirements, and the children's program⁸ requirements. Children's Television Standard (CTS) 2 provides that a children's program must be:

- made specifically for children or groups of children within the preschool or the primary school age range;
- entertaining;
- well produced;
- enhance a child's understanding and experience;
- appropriate for Australian children.

A program cannot obtain quota points for children's programs unless it is assessed by the ABA as meeting these requirements.

Thus, the program must enhance understanding and experience (so it is educational, as required by Article 29), and be entertaining, thus complying with Articles 29 and 17. It must be well produced and specifically made for children, thus of social and cultural benefit to the child (Article 17), and developing the child's personality, talents and mental abilities to their fullest potential (Article 29). Finally, it must be appropriate for Australian children, thus promoting the Australian child's cultural identity.

Children's Television Standard (CTS) 11 further promotes the social and cultural benefit of the child (Article 17)

by mandating the production of fully scripted screenplays 'in which the dramatic elements of character, theme and plot are introduced and developed so as to form a narrative structure'.

The Articles are also arguably promoted through the Australian content standard, assuming that it is correct to read Article 17 as referring to cultural identity and cultural diversity appropriate in the domestic context of Australia. Clause 3 of the Australian Content standard states:

The object of this Standard is to promote the role of commercial television in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to television programs produced under Australian creative control.

Thus, the standard aims to promote object 3(e) by ensuring the existence of television programs produced under Australian creative control. By promoting object 3(e), the standard promotes the objectives of Articles 17 and 29 and Article 1 of the ICCPR in the Australian domestic context. It should also be noted that the Standard imposes Australian content obligations in relation to children's drama and children's and preschool programs. It would therefore appear that as there is no conflict between the Conventions and the objects of the BSA, the Conventions are incorporated for the purposes of the ABA's exercise of its functions.

Article 17(e) is promoted by the provisions of the Standards and the Code of Practice for Commercial Television which relate to advertising directed to children, regulating competitions, and other promotions.

As was the case for the implementation of the ICCPR, the ABA, in its complaints function, should ensure that it acts in accordance with the legitimate expectation which has arisen by virtue of this Convention.

CONCLUSION

To summarise, the provisions of both the ICCPR and the Convention on the Rights of the Child have been incorporated into domestic law for the purposes of the ABA's functions relating to object 3(e) of the BSA. To the extent of any conflict between the objects of the BSA and the Conventions, the ABA is

entitled to assume that the treaties have not been incorporated as part of domestic law. These treaties as incorporated require the ABA to, among other matters, develop the cultural identity of children through the Children's Television standards, and to promote the right of Australians to social and cultural development through the Australian content standard.

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1 See *Project Blue Sky & ors v Australian Broadcasting Authority*, unreported, Davies J, Federal Court, 2 August 1996 and orders 26 August 1996. The ABA's appeal to the Full Court (Northrop, Wilcox and Finn JJ) was successful (Northrop J dissenting). A special leave application will be heard by the High Court on 11 April 1997.

2 Allars, M, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law' (1995) 17 *Sydney Law Review* 204 at page 216.

3 The Australian Content Standard was determined on 15 December 1995, with effect from 1 January 1996.

4 The Variation to the Children's Television Standards was determined on 15 December 1995

and came into force on 1 January 1996. The Children's Television Standards were determined by the Australian Broadcasting Tribunal under the *Broadcasting Act 1942* and by effect of section 21(2) of the *Broadcasting Services (Transitional Provisions) Act 1992* are taken to be standards determined under section 122(1)(a) of the BSA.

5 Per Mason CJ and Deane J, *supra* note 6.

6 The decision of the Full Federal Court (Northrop, Wilcox and Finn JJ, Northrop J dissenting) was delivered on 12 December 1996.

7 *Minister for Immigration v Teoh* (1995) 183 CLR 273

8 The children's program includes programs made for preschool children (P programs) and programs made for primary school children (C programs).

The New Fair Trading Condition in British Telecommunications' (BT) Licence

Christina Hardy provides an update on telecommunications regulatory developments in the UK.

There have been some recent changes to BT's licence relating to interconnection price control and fair trading that provide an interesting opportunity for some comparisons with Australia's new framework for open competition.

To put the UK developments into a wider European context, European Union Member States are gearing up for full liberalisation of the voice telephony market from January 1998. As the UK has had a deregulated telecommunications market for thirteen years, any change to the UK regulatory regime provides an insight into potential trends and options for regulation of the EU telecommunications sector post-January 1998.¹

This article gives a brief outline of the relevant parts of the UK telecommunications licensing regime, sets out the major provisions of the new Price Control changes and the Fair Trading Condition in BT's licence and reviews the guidelines to the fair trading condition.

UK background

A fair and efficient interconnection framework is critical to any deregulated telecommunications market if competition is to thrive. In the UK each "public telecommunications operator" (PTO) licence contains specific conditions geared to ensuring other operators interconnect to each other's "systems" (networks) so that any-to-any service can be provided to customers and setting ground rules about a wide range of matters that facilitate competition such as prohibiting certain anti-competitive conduct. Unlike Australia, much of the detail about the regulatory rules is in each individual PTO licence, and not in the legislation.

Predictably, the operation of BT's licence conditions come under more scrutiny than do those of other operators. Thirteen years after competition was introduced into the UK market, OFTEL has recommended a modification to BT's licence by inserting a "fair trading condition"² at the same time as relaxing other conditions, such as those about price control, the basis for funding the universal service obligation and monitoring interconnection standard service charges.

As the Director-General of OFTEL, Don Cruickshank, put it: "the [Price Control and Fair Trading] package provides the basis for continued investment by BT and its competitors in the UK. It is deregulatory. But if BT is to have more pricing freedom, then OFTEL has to have effective powers to deal with anti-competitive behaviour. That is why Price Control and the introduction of the Fair Trading conditions are tied together in a single package."³

Price Control

The price control part of the package sets out a new methodology for calculating BT's interconnection charges and gives BT more power to set access charges for different services, depending on how competitive the service is.⁴ The final draft of the price control measures is due for release in May 1997 and the package will come into operation from August 1997.

The new system of calculating interconnection charges set out in the June 1996 package is based on long run incremental costs for the period August 1997 to July 2001, replacing the existing system of calculating interconnection