GOVERNMENT RESPONSE TO THE REPORT, AUSTRALIAN CONTENT STANDARD FOR TELEVISION AND PARAGRAPH 160(d) OF THE *BROADCASTING SERVICES ACT 1992* BY THE SENATE ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS LEGISLATION COMMITTEE

MINISTER FOR COMMUNICATIONS,
INFORMATION TECHNOLOGY AND THE ARTS
November 1999

INTRODUCTION

High Court Decision

On 28 April 1998, the High Court of Australia allowed an appeal by Project Blue Sky Inc, representing the New Zealand film and television production industry

Reasons for the Decision

The ABA's Broadcasting Services (Australian Content) Standard 1999 took effect from 1 March 1999. It meets Australia's international treaty obligations to New Zealand and continues to fulfil the Australian identity object of the BSA. It has preserved the structure of the current standard while minimising incentives for commercial broadcasters to replace Australian product with cheaper New Zealand product. The revised standard will be closely monitored, and reviewed by the ABA after its first two years of operation.

Senate Committee Inquiry

The implications of retaining, repealing or amending section 160(d) of the BSA was referred to the Senate Environment, Recreation, Communications, Information Technology and the Arts Legislation Committee (the Committee) on 2 July 1998 for consideration. Section 160 (d) requires the ABA to act in a manner consistent with Australia's international obligations. The Committee released its report on 17 February 1999.

Government Announces Its Response

The Government welcomed the report and considered the Committee's recommendations as part of the development of its response to the High Court's decision, announced on 19 March 1999:

- the BSA will be amended to ensure that access under s160(d) to local content quotas by TV programs from other countries is explicitly confined to New Zealand; and
- the Government will ensure that Australia's cultural objectives for the audiovisual sector are taken into account in negotiating future trade agreements.

As the content quota for pay TV is also inconsistent with the CER Services Protocol, the Government further announced on 19 March 1999 that the BSA would be amended so that New Zealand programs count be counted for the purposes of the content quota. This is intended to provide New Zealand program makers with access to the content quota, which is no less favourable than Australian program makers. The Government also decided to amend the ways in which eligible programs qualify for the pay TV content quota by making them consistent with the ways in which programs qualify for the content quota for free-to-air commercial television. The impact of the changes to the pay TV content requirement will be closely monitored by the ABA, and formally reviewed after the new requirements have been operating for three years.

While these changes embrace the thrust of the Committee's recommendations they also maintain the Government's commitment to the CER Services Protocol. The Government's decision confines the impact of the High Court's decision to New Zealand, closing off the possibility of flow on under the section to other treaties. It also maintains the cultural policy objectives of content regulation.

Subject to enactment by Parliament, these amendments will confine the impact of the High Court's decision, and remove the possibility of possible future challenges to the

standard. This should continue to allow Australians access to Australian programming on free-to-air commercial television and should provide them with more Australian content on pay television with resultant benefits for the film production industry. Amending what is an eligible program for the content quota for pay TV will ensure that cultural policy objectives are more closely met by removing the possibility that programs with low levels of Australian, or New Zealand content could continue to count towards the pay TV quota.

The Minister for Communications, Information Technology and the Arts sought comment from the Minister for Foreign Affairs, the Minister for Trade and the Attorney-General in the preparation of the Government's response to the report.

RECOMMENDATION 1

That the ABA state in the introduction to its new standard that Australian culture and New Zealand culture are different from each other. They each have their own distinct characteristics and are not interchangeable. The ABA must make it clear that if the new standard gives special status to NZ productions the aim is solely to make the standard consistent with Australia's obligations under the CER Services Protocol.

The Government notes that the ABA has implemented this recommendation.

The Broadcasting Services (Australian Content) Standard 1999 contains the following text in its introduction:

While Australian culture and New Zealand culture are different from each other, in order to be consistent with the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement, this standard recognises New Zealand programs and Australian/New Zealand programs equally with Australian programs for the purposes of compliance with this standard.

RECOMMENDATION 2

That, in the event of the ABA's new standard being implemented, its effects on the number of NZ programs broadcast as part of various television quotas should be closely monitored by the ABA, with a view to taking remedial action if the ABA finds that object 3(e) of the BSA is no longer being met. The ABA should report to the Minister after two years of operation of any new standard.

The Government notes that the ABA has announced that it will closely monitor and review the Broadcasting Services (Australian Content) Standard 1999 after the first two years of operation to assess how well it is achieving its cultural purpose.

RECOMMENDATION 3
Section 160(d) of the BSA be amended to limit its scope by requiring the ABA to perform its functions having regard to Australia's obligations under any convention of which the Minister has notified the ABA in writing.

While the ABA has revised the Australian Content Standard so that it meets Australia's obligations under the CER Services Protocol with New Zealand, section 160(d) still poses a problem for the Authority. It is drafted broadly and requires the ABA 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.

The Government considered that Recommendation 3 did not provide sufficient reassurance to the Australian public that there would be no flow on to other treaties as an instrument of notification could subsequently be revoked or amended, or a new instrument made.

As its preferred approach, the Government has announced that it will be amending the BSA to protect the level of Australian content on free-to-air and pay television so that foreign access to local content quotas under the section will be explicitly confined to New Zealand.

It will achieve this outcome by amending section 160(d) of the BSA to limit its scope to the CER Services Protocol with New Zealand and by amending the definitions for the pay TV rules in the BSA to confine eligible quota programs to Australian or NZ drama programs. This benefit of this approach is that it will accommodate the CER Services Protocol, retain the special position of New Zealand, while making it clear that there are no flow ons under the amended section to other treaties. It will also assist the ABA in the exercise of its regulatory responsibilities.

RECOMMENDATION 4
That on the question of NZ/third party co-productions, the Government should negotiate with the NZ Government with a view to exchanging side letters to the CER Services Protocol to clarify both countries' understanding of the meaning and application of the CER Services Protocol in relation to NZ/third party co-productions. The side letter should make it clear that NZ/third party co-productions would not be eligible for the purposes of the Australian Content Standard quota.

The Government does not support this recommendation.

The representative from the Office of International Law in the Attorney-General's Department gave evidence to the Committee which would support the proposition that New Zealand/third party co-productions are not covered by the CER Services Protocol.

The Broadcasting Services (Australian Content) Standard does not allow New Zealand/third party co-productions to be counted as local content under the standard.

While the New Zealand Minister for International Trade has publicly expressed satisfaction with the national treatment that is extended to New Zealanders under the new standard, and has stated that the standard "satisfactorily resolves the market access issue for New Zealand broadcasters", the New Zealand Government in submissions to the ABA's review of the Australian Content Standard stated that national treatment under the standard should be extended to official New Zealand/third party co-productions.

Clearly then, the New Zealand Government has not conceded that such co-productions are excluded from the coverage of the Protocol. Given this apparent difference of opinion, it is unlikely that New Zealand would enter into an exchange of letters as suggested in the recommendation.

RECOMMENDATON 5
That, in accordance with the Canadian precedent, an exclusion clause for cultural industries should be inserted in all future trade agreements with other countries.

The Government does not support this recommendation.

A uniform approach to cultural aspects of trade agreements would be a major negotiating disadvantage and would work against the national interest in future negotiations. The preservation of Australian cultural distinctiveness is a legitimate and important objective of our external policies, but the approach recommended by the Committee is not likely to further it as, in the absence of an agreed definition of "culture" in the trade field, this recommendation would be impossible to implement in practice. We do not wish to endorse a broad interpretation of culture; other countries could attempt to justify carve-outs in a range of sectors on spurious "cultural" grounds, thereby seriously disadvantaging Australia's interests.

Audiovisual services tend to be highly sensitive, for Australia as for other countries. In the Uruguay Round of multilateral trade negotiations, Australia made no commitments in the audiovisual sector under the General Agreement of Trade in Services (GATS). Australia also took out a MFN exemption to protect our film co-production agreements and one to respond to any unreasonable and unfair unilateral actions in the audiovisual subsector. There are a number of regulations relating to the Australian audiovisual industry, eg local content provisions and special assistance measures which would be potentially inconsistent with GATS market access and national treatment obligations, were we to remove our exemptions.

The Government is consulting widely before the WTO 2000 services negotiations, during which there will be pressure on all Members to improve their offers in all sectors, including on Australia for audiovisual. The former Deputy Prime Minister and Minister for Trade, Mr Fischer, launched a series of public consultations in February for the next round of trade negotiations, and the Department of Foreign Affairs and Trade is now

examining the submissions which were made, including a number from the Australian audiovisual industry. After extensive consultation processes, the Government will be able to give appropriate weight to the special considerations raised by the sector, including cultural policy objectives, in determining and prosecuting Australia's negotiating strategy.

RECOMMENDATION 6
That the Department of Foreign Affairs and Trade examine the Government's obligations under other treaties to which Australia is a party to, with a view to the Government beginning negotiations to remove any possible applications to cultural industries.

The Government does not support this recommendation.

While the Government is prepared to look at any particular difficulties of implementation in respect of existing treaties, it is not prepared as a general policy to revisit binding commitments which it freely entered into. It also notes that this Recommendation has major resource implications and that there is no likelihood that Australia's treaty partners would be prepared to enter into the negotiations which the Committee recommends.

RECOMMENDATION 7
That the Government approach NZ to seek an amendment to the CER Services Protocol which would insert a "cultural industries clause" to exempt services relating to cultural industries from the Protocol.

The Government does not support this recommendation.

The New Zealand Government has stated that it regards the Broadcasting Services (Australian Content) Standard 1999 as implementing the High Court's Blue Sky decision in an appropriate way and in a manner consistent with the CER Services Protocol. Both Governments are progressively removing their remaining inscriptions from the Annex to the Protocol (to further liberalise, rather than restrict, bilateral trade in services). The Australian Government will not therefore be seeking to amend the Protocol with the intention of excluding New Zealand programs from coming under the standard. In addition to the effect which the attempted implementation of the recommendation might be expected to have on our bilateral relations with New Zealand (which would not agree to the amendment), such a move could also have negative implications for Australia's broader trade policy objectives.

The Broadcasting Services (Australian Content) Standard 1999 demonstrates that it is possible for the Australian Content Standard to achieve consistency with Australia's CER obligations, while still meeting the requirements of the BSA section 3(e) (which gives as one of the objects of the Act the promotion of the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity).

In the review of the standard which is due to commence by 1 July 2001, the ABA will be reviewing the extent of any displacement of Australian programs by New Zealand programs, and any secondary market price effects.

MINORITY REPORT BY ALP SENATORS ON AUSTRALIAN CONTENT REGULATION FOR COMMERCIAL TELEVISION BROADCASTERS

RECOMMENDATION 1

At first instance, Labor Senators prefer that the ABA redraft the new Australian Content Standard so that it achieves the purpose Australian Content Standards are intended to achieve.

The Government considers that the Broadcasting Services (Australian Content) Standard 1999 strikes an appropriate balance between Australia's trade and cultural objectives. It provides safeguards for categories of Australian programs considered vulnerable to substitution by cheaper New Zealand product, while complying with Australia's obligations under the CER Services Protocol.

RECOMMENDATION 2

If Recommendation 1 is unachievable, it is recommended that the Government legislate to amend section 160(d) of the BSA to enable the ABA to continue to set effective Australian Content Standards.

The repeal of section 160 (d) of the BSA would mean that the ABA would no longer be bound, as a matter of domestic law, to take international obligations into account in carrying out its functions.

However, the Government notes that the repeal of Section 160 (d) would only remove the requirement under the BSA that the ABA act in a manner consistent with our international obligations. It would not remove our obligations to New Zealand under international law, and could undermine the benefits Australia receives from rules-based world trade.

The Government considers that its proposed amendment to the BSA is the most effective means of making it consistent with our obligations under the CER Services Protocol, whilst retaining the cultural policy objectives of the BSA, and providing greater regulatory certainty to the ABA and to the industry by obviating the possibility of flow ons under the section to other trade agreements and treaties.