HIGH COURT OF AUSTRALIA

BRENNAN CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

PROJECT BLUE SKY INC & ORS — APPELLANTS

AND

AUSTRALIAN BROADCASTING AUTHORITY — RESPONDENT

Project Blue Sky v Australian Broadcasting Authority (S41-1997)
[1998] HCA 28
28 April 1998

ORDER

1. *Appeal allowed.*

2. *The respondent pay the appellants' costs of this appeal.*

3. *In lieu of the orders of the Full Court of the Federal Court of 12 December 1996, substitute the following orders:*

    1. *The appeal be allowed and the orders made by Davies J set aside.*

    2. *THE COURT DECLARES THAT cl 9 of the Australian Content Standard (the Standard) determined by the Appellant on 15 December 1995 was unlawfully made.*

    3. *THE APPELLANT pay the costs of the appeal and of the proceedings before Davies J.*

    4 *Each party has liberty to apply further, as it may be advised.*

    5. *Without limiting the generality of Order 4, the Respondents have liberty to apply for such further or other orders as they may be entitled to arising from the alleged failure of a clause of the Standard to comply with Australia's obligations under the Australia New Zealand Closer Economic Relations Trade Agreement and the Trade in Services Protocol to that agreement.*

6. There be no order in relation to the costs of the interveners.

On appeal from the Federal Court of Australia

Representation:

R J Ellicott QC with D M Yates and A J Silink for the appellants (instructed by Minter Ellison)

R V Gyles QC with N E Abadee for the respondent (instructed by Australian Government Solicitor)

Amici Curiae:

S J Gageler amici curiae on behalf of the Australian Film Commission, Australian Film Finance Corporation Limited, Australian Children's Television Foundation, Screen Producers' Association of Australia, Australian Writers' Guild Limited, Media, Entertainment and Arts Alliance, Australian Screen Directors' Association, Susan Lyons, Graham Thorburn, Denise Morgan and Jonathan M Shiff Productions Pty Limited (instructed by Fisher Grogan)

CATCHWORDS

Project Blue Sky Inc & Ors v Australian Broadcasting Authority

Statutes - Construction - Reconciliation of conflicting provisions - Intention of legislature - Presumption that provisions intended to achieve consistent goals - Leading and subordinate provisions - Grammatical meaning and legal meaning.

Statutes - Construction - Acts done in breach of a condition regulating a statutory power - Whether invalid - Mandatory and directory provisions - Purpose-based test.

Media law - Television - Regulation of programming - Australian Broadcasting Authority - Standard prescribing Australian content requirements - Whether inconsistent with legislative requirement that functions be performed consistently with Australia's international obligations.

Media law - Television - Regulation of programming - Australian Broadcasting Authority - Power to make standards that "relate to ... the Australian content of programs" - Whether restricted to standards conferring preferential treatment.

Trade law - Australia New Zealand Closer Economic Relations Trade Agreement.

Broadcasting Services Act 1992 (Cth), ss 3, 122, 158, 160.

Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992 (Cth), s 21.

Tasker v Fullwood [1978] 1 NSWLR 20 at 23-24 applied.

1 BRENNAN CJ. The Australian Broadcasting Authority ("the ABA") has a number of "primary functions" which are listed in s 158 of the *Broadcasting Services Act* 1992 (Cth) ("the Act"), including, inter alia:

> "(h) to assist broadcasting service providers to develop codes of practice that, as far as possible, are in accordance with community standards; and
>
> (i) to monitor compliance with those codes of practice; and
>
> (j) to develop program standards relating to broadcasting in Australia; and
>
> (k) to monitor compliance with those standards".

Section 159 allows for "additional functions" which may be conferred on it by the Act or another Act. Section 160 imposes general obligations on the ABA in these terms:

> " The ABA is to perform its functions in a manner consistent with:
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> (a) the objects of this Act and the regulatory policy described in section 4; and
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> (b) any general policies of the Government notified by the Minister under section 161; and
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> (c) any directions given by the Minister in accordance with this Act; and
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> (d) Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country."

In these proceedings, the appellants (to whom I shall refer as "Blue Sky"), which have the objective of encouraging the profitable growth of the New Zealand film and television industry, challenge the validity of a standard determined by the ABA on the ground that the ABA has not performed its function consistently with Australia's obligations under an "agreement between Australia and a foreign country". The agreement relied on is the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement. The Protocol came into force on 1 January 1989. Article 4 of the Protocol reads as follows:

> "Each 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."

Article 5(1) reads as follows:

> "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".

2 Blue Sky contends that, by reason of Arts 4 and 5(1), Australia is under an obligation not to create or maintain any legal impediment which would adversely affect the capacity of the New Zealand film and television industry to compete equally with the Australian industry in the Australian market for the broadcasting of film and television products.

3 The impugned standard, known as the Australian Content Standard, was determined by the ABA on 15 December 1995 in purported exercise of the power conferred on the ABA by s 122(1)(a) of the Act. Part 5 of the Australian Content Standard, headed "Transmission Quota" contains but one clause: cl 9, headed "Australian transmission quota". Clause 9 reads:

> " (1) Subject to subclause (3), until the end of 1997, Australian programs must be at least 50% of all programming broadcast between 6.00am and midnight in a year that was made without financial assistance from the television production fund.
>
> (2) Subject to subclause (3), from the beginning of 1998, Australian programs must be at least 55% of all programming broadcast between 6.00am and midnight in a year that was made without financial assistance from the television production fund.
>
> (3) If an Australian program:
>
> (a) is first release sports coverage; and
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> (b) begins before midnight and ends on the next day;
>
> the part of the program broadcast between midnight and 2.00am is taken to have been broadcast between 6.00am and midnight."

The quotas specified in cl 9 guarantee minimum periods between 6.00am and midnight during which Australian programs are to be broadcast. New Zealand programs are left to compete with all other programs (including Australian programs) for the remainder of the periods between 6.00am and midnight. Even if New Zealand programs were successful in obtaining transmission for the entire 50% of the relevant periods which, until the end of 1997, were available after the Australian program quota was satisfied, the Australian Content Standard would preclude their achieving more than 45% from the beginning of 1998. The definition of an Australian program is contained in cl 7 which reads:

> " (1) A program is an Australian program if:

(a) it 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); and

(b) it was made without financial assistance from the television production fund.

(2) A program is an Australian program if:

(a) the Minister for Communications and the Arts has issued a final certificate under section 124ZAC of Division 10BA of Part III of the *Income Tax Assessment Act 1936* in relation to the program; and

(b) the certificate is in force.

(3) A program is an Australian program if it has been made pursuant to an agreement or arrangement between the Government of Australia or an authority of the Government of Australia and the Government of another country or an authority of the Government of another country.

(4) Subject to subclause (5), a program is an Australian program if:

(a) the producer of the program is, or the producers of the program are, Australian (whether or not the program is produced in conjunction with a co-producer, or an executive producer, who is not an Australian); and

(b) either:

(i) the director of the program is, or the directors of the program are, Australian; or

(ii) the writer of the program is, or the writers of the program are, Australian;

and

(c) not less than 50% of the leading actors or on-screen presenters appearing in the program are Australians; and

(d) in the case of a drama program – not less than 75% of the major supporting cast appearing in the program are Australians; and

(e) the program:

(i) is produced and post-produced in Australia but may be filmed anywhere; and

(ii) in the case of a news, current affairs or sports program that is filmed outside Australia, may be produced or post produced outside Australia if to do otherwise would be impractical.

(5) If an Australian program:

(a) is comprised of segments which, if they were individual programs, would not comply with subclause (4); and

(b) is not a news, current affairs or sports program;

only those segments that, if they were individual programs, would comply with subclause (4) are taken to be Australian programs".

4 The Australian Content Standard thus provides a minimum quota for the transmission of programs made in compliance with sub-cll (2), (3) or (4) of cl 7, that is, programs classified by the circumstances in which they were made. It is the provenance of a program, not its subject matter, which determines whether it is an "Australian program" for the purposes of the Australian Content Standard. The Australian Content Standard gives a competitive advantage to programs having an Australian provenance over programs having a corresponding New Zealand provenance. Thus the Australian Content Standard appears not to be consistent with Australia's obligations under Arts 4 and 5(1) of the Protocol.

5 In the Federal Court, Davies J made a declaration that the Australian Content Standard "is invalid to the extent to which it fails to be consistent with the Protocol". The consequential order that his Honour made was in these terms:

"2. THE COURT ORDERS THAT unless the Standard is revoked or varied in accordance with law by the Respondent on or before 31 December 1996, the Standard is set aside with effect from 31 December 1996."

On appeal to the Full Court of the Federal Court a majority (Wilcox and Finn JJ, Northrop J dissenting) upheld the validity of the ABA's Standard. The Full Court allowed the appeal and dismissed Blue Sky's application[1]. Pursuant to a grant of special leave, Blue Sky appeals against the Full Court's orders and seeks in lieu thereof a declaration that the Australian Content Standard is invalid.

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1 (1996) 71 FCR 465 at 484; 141 ALR 397 at 415.

The issues

6 The power of the ABA to determine standards is conferred by s 122 which reads:

" (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."

The standards which may be determined in exercise of the power conferred by s 122 are limited to standards relating to the matters specified in pars (a) and (b) of sub-s (2) - relevantly, "the Australian content of programs".

7 The majority of the Full Court pointed out[2] that the term "Australian content" is not defined by s 122 or by any other provision in the Act. The connotation which their Honours attributed to "Australian" was "something particular to this country". Then, noting that "a New Zealand program is not an Australian program", their Honours reasoned that[3] -

" If the ABA specified the 'Australian content' of television programs in such a way as to allow any of that required content to be satisfied by New Zealand programs, however they might be defined, it would fail to carry out its statutory task. ... The only standard the ABA could set, consistent with the Protocol, would be one that allowed for there to be no Australian content programs at all, provided that New Zealand programs were broadcast in lieu

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2 (1996) 71 FCR 465 at 482; 141 ALR 397 at 413.

3 (1996) 71 FCR 465 at 482; 141 ALR 397 at 413.

> 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."

8 Herein lies a difficulty. The proposition that a New Zealand program does not, or cannot, satisfy the "Australian content" requirement of a standard to be determined under s 122 is not self-evident. No doubt the proposition depends on the meaning to be attributed to "Australian content" in s 122, a question to which I shall return. The proposition led their Honours to the conclusion[4] that, in enacting ss 122 and 160 -

> " Parliament has given the ABA two mutually inconsistent instructions. It has said, first, that the ABA is to provide for preferential treatment of Australian programs, but, second, that it is to do so even-handedly as between Australia and New Zealand."

Holding that there was an irreconcilable conflict between s 122(2)(b) and s 160(d), the majority regarded s 122(2)(b) as a special provision overriding the general provision in s 160(d)[5]. Accordingly, the validity of the Australian Content Standard was upheld.

9 In argument, Blue Sky attacked the reasoning of the majority but chiefly upon grounds which appear to assume that a standard prescribing a transmission quota for "Australian programs" as defined by cl 7 of the Australian Content Standard is a standard relating to the "Australian content" of programs within the meaning of that term in s 122(2)(b). On that assumption and on the further assumption that "Australian content" excluded non-Australian content, New Zealand programs could not satisfy either the Australian Content Standard or any other standard determined under s 122(1). Allowing that to be so, the argument relied on the wide import of the words "relate to" in s 122(2). The width of that phrase was said to permit the prescription of transmission quotas for Australian programs in terms which, in obedience to s 160(d), would also provide equal transmission quotas for New Zealand programs[6]. It was also submitted that a standard would "relate to"

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4 (1996) 71 FCR 465 at 483; 141 ALR 397 at 414.

5 (1996) 71 FCR 465 at 484; 141 ALR 397 at 414.

6 An example was proffered of a standard which prescribed 10% or more solely for Australian programs, an equal percentage solely for New Zealand programs but a minimum 50% for Australian and New Zealand programs combined. The ABA submitted that such a standard would be an invalid prescription of New Zealand content and would diminish the minimum Australian content which the ABA had found to be appropriate.

Australian content and would be valid if it prescribed Australian content without excluding non-Australian content.

10 Before any inconsistency can be found between s 122(2)(b) and s 160(d), it is necessary to ascertain the meaning of the terms used in the former provision. What is a "standard" and what is "Australian content"? The parties and the interveners made their submissions principally on the basis that Australian content could be seen or heard only in a program having an Australian provenance. The adoption of that common basis is understandable.

11 First, it is in the interveners' interests to assert that Australian content is to be found only in programs having an Australian provenance. If that be correct, s 122(2) authorises the determination of a standard that, by safeguarding Australian content, safeguards programs having an Australian provenance.

12 Secondly, the commercial interests represented by Blue Sky presumably recognise that the content of programs made in New Zealand or by New Zealanders will not be recognisably Australian or will be less likely to be recognisably Australian than programs having an Australian provenance. Blue Sky did not seek to have the Australian Content Standard set aside on the ground that the power to determine standards could be used only to prescribe the content of programs, whatever the provenance of those programs might be. However, Mr Ellicott QC, senior counsel for Blue Sky, accepted that to confine "Australian content" to what could be seen and heard in a program and to deny that the term includes the provenance of a program removes any possibility of inconsistency between s 122(2)(b) and s 160(d). In the course of argument, counsel submitted:

> "Obviously, if a standard could be devised which had no reference to - I have called them trade-related matters - then it may be that there was no need to be concerned about the international obligation.
>
> ... May I say this ... *if a standard was confined to content in the sense of subject matter, then anybody in the world could make or produce with whatever actors or writers, et cetera, they wanted to such films.* Therefore, it could be argued everybody would be on a level playing field in relation to such a standard and there may not be any specific requirements for the application of section 160(d).
>
> In other words, all I am positing is that it is quite possible, fully consistent with our argument, that you may have a case where a standard satisfies section 122 and is consistent with section 160(d), even though it does not have to mention New Zealand films or other films if they have a most favoured nation situation." (Emphasis added.)

But Blue Sky was not willing to advance that as the true construction of "Australian content", perhaps because it was thought that success on that ground might yield

little commercial benefit. This seems to have been recognised by counsel who observed that "my clients might in another matter want to say otherwise".

13 However, the interests of persons concerned in the litigation and the assumptions made in the rival submissions cannot divert the Court from its duty to construe the statute. "Judges are more than mere selectors between rival views", said Lord Wilberforce in *Saif Ali v Sydney Mitchell & Co*[7], "they are entitled to and do think for themselves".

14 Thirdly, the ABA relied on the legislative history relating to program standards in an attempt to show that "Australian content" in s 122(2)(b) requires the involvement of Australians in the making of the program and that cl 7 of the Australian Content Standard conforms with the historical understanding.

15 The issues for determination can now be stated:

1. Is a transmission quota for programs of a particular description a "standard"?

2. What is the meaning of "the Australian content of programs"?

3. Is the Australian Content Standard consistent with s 160(d)?

4. If not, is the Australian Content Standard valid?

1. <u>Is a transmission quota a standard</u>?

16 A standard in the context of something "to be observed by commercial television broadcasting licensees" is a measure of performance to which licensees must attain. As the standard must relate to "the Australian content of programs", a standard to be observed by broadcasting licensees is a standard which is calculated to ensure that they broadcast programs of Australian content. A transmission quota for programs is a standard of that kind.

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7 [1980] AC 198 at 212.

2. "The Australian content of programs"

(a) Legislative history

17 The *Broadcasting Act* 1942 (Cth) ("the 1942 Act") which was repealed by the Act defined[8] "program standard" as "a standard or condition determined by the Tribunal in the performance of its function under paragraph 16(1)(d)". Section 16(1)(d) of the 1942 Act[9] defined one of the functions of the Australian Broadcasting Tribunal constituted under that Act to be the determination of "standards to be observed by licensees in respect of the broadcasting of programs and in respect of programs to be broadcast". The definition did not provide a description of the kind of programs which might be selected in determining a standard. A standard was determined by the Tribunal under the 1942 Act known as (TPS)14 which contained a transmission quota for Australian programs and other provisions designed to ensure the broadcasting of programs in the making of which Australians played a substantial part or which featured Australians[10] or the accomplishments of Australians. When the Act - that is, the 1992 Act - was introduced, transitional provisions were introduced by the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth) ("the Transitional Act"). Section 21 of the Transitional Act affected the continuance of (TPS)14, the relevant provisions of the section reading as follows:

> " (1) In subsection (2), a reference to a program standard is a reference to a program standard that was in force immediately before the commencement of this Act under paragraph 16(1)(d) of the Broadcasting Act.
>
> (2) A program standard or a part of a program standard that related to programs for children or the level of Australian content of programs is taken, after that commencement, to be a standard determined by the ABA under paragraph 122(1)(a) of the new Act.
>
> (3) For the purposes of subsection (2), the provisions of section 114 of the Broadcasting Act are taken to be program standards in force under the Broadcasting Act relating to the level of Australian content of programs.

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8 s 4(1).

9 See s 99(2) of the 1942 Act and ss 123(2) and 125 as well as s 122 of the 1992 Act.

10 Section 114 of the 1942 Act required the Australian Broadcasting Corporation and commercial broadcasting licensees under that Act to use the services of Australians, as far as possible, "in the production and presentation of radio and television programs".

...

(8) A program standard relating to a matter referred to in subsection (2) ceases to be in force upon the determination by the ABA under paragraph 122(1)(a) of the new Act of a program standard relating to that matter.

..."

18 The ABA submits that the Parliament must have understood that the continuance of (TPS)14 and the continued operation of s 114 of the 1942 Act meant that the standard which the ABA was to determine under s 122(2)(b) was a standard governing the minimum use or the preferential use of Australian programs. Thus, so the argument ran, the Australian Content Standard was within the power conferred on the ABA by s 122.

19 The argument fails to take account of the text of s 21(2) of the Transitional Act and s 122(2) of the 1992 Act. Section 21 of the Transitional Act does not continue the entirety of a standard determined under the 1942 Act. Sub-section (2) provides that only a program standard or only that part of a program standard under the 1942 Act which related to "programs for children or the level of Australian content of programs" should be taken to be a standard determined under s 122(1)(a) of the 1992 Act. Section 21 of the Transitional Act textually follows the terms of s 122(2) of the 1992 Act. To ascertain what part of (TPS)14 was continued in operation when the 1992 Act commenced operation, it is necessary to construe the text of s 122(2) which accords with s 21 of the Transitional Act. To assume that (TPS)14 continued in undiminished force in order to illuminate the meaning of the words which governed whether and to what extent it was continued in force is a fallacy: it assumes the operation of a statute in order to discover its meaning.

20 However, the scope of s 21(2) of the Transitional Act is fictionally extended by sub-s (3) which requires the provisions of s 114 of the 1942 Act be taken to be a program standard in force under the 1942 Act "relating to the level of Australian content of programs". That deeming provision, which expired pursuant to sub-s (8), cannot illuminate the meaning of "Australian content" except in one respect. It indicates that preferential provisions such as those contained in s 114 of the 1942 Act would not fall within the concept of "a standard relating to the Australian content of programs" if there were no deeming provision.

21 Thus the legislative history of the relevant provisions of the 1992 Act sheds no light on the meaning of s 122(2)(b). It remains for this Court to ascertain the meaning of "Australian content" in s 122(2)(b) from the statutory context and to determine whether the Australian Content Standard, so far as it prescribes a transmission quota for programs having an Australian provenance, relates to the Australian content of programs.

(b) The meaning derived from the statutory context

22 The term "program" in relation to a broadcasting service is defined by the Act[11] to mean:

> "(a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or
>
> (b) advertising or sponsorship matter, whether or not of a commercial kind".

The "content" of a "program" is what a program contains. The Act calls that content "matter": it is what the broadcast audience sees or hears. "Australian" is the adjective describing the matter contained in the program; but the matter contained in a program is not its provenance. The content of a program for broadcast may be difficult to define in a statute, for it has to do with the communication of sights and sounds that convey ideas and the classification of an idea as "Australian" is a rather elusive concept. But that is not to deny the reality of Australian ideas; they are identifiable by reference to the sights and sounds that depict or evoke a particular connection with Australia, its land, sea and sky, its people, its fauna and its flora. They include our national or regional symbols, our topography and environment, our history and culture, the achievements and failures of our people, our relations with other nations, peoples and cultures and the contemporary issues of particular relevance or interest to Australians. The conferring of power on the ABA to determine a standard relating to the Australian content of programs accords with one of the objects prescribed by the Act, namely, "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity"[12].

23 The "Australian content of a program" is the matter in a program in which Australian ideas find expression. The ABA is empowered by s 122(1)(a) to determine a transmission quota for programs in which Australian ideas find expression and the manner in which and the extent to which such programs must contain Australian ideas.

24 Also, s 125 empowers the ABA to determine standards in relation to a matter referred to in s 123(2) if a code of practice governing such a matter has not been registered or is not operating to provide appropriate community safeguards. The "matters" referred to in s 123(2) are all concerned with the content of programs to

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11 s 6.

12 s 3(e).

be broadcast, the last of which is expressed[13] as "such other matters relating to program content as are of concern to the community". That "content" is a term which connotes what is to be seen and heard in a program is confirmed by the provisions of s 129. That section ensures that the ABA's power to determine standards does not empower the ABA to require the approval by it of programs before broadcasting except in relation to children's programs. The purpose of the provision seems to be to deny the ABA general power to require a program, other than children's programs, to be seen and heard by the ABA before broadcasting.

25 A distinct regime applies in respect of "Australian drama programs" which might be broadcast by subscription television broadcasting licensees. The definition of "Australian drama program" in s 6 draws a distinction between the provenance of a drama program and its content. That definition selects Australian provenance and Australian content as alternative criteria of Australian drama programs. These are the programs for which a minimum expenditure requirement is imposed on subscription television broadcasting licensees by s 102. Although s 215 includes a minimum expenditure requirement as an item to be reviewed by the Minister when the Minister reviews "the operation of the condition relating to Australian content on subscription television broadcasting licensees", the circumstance that either criterion will identify a program as an Australian drama program does not mean that "Australian content" includes Australian provenance. The "condition" relating to Australian content is prescribed[14] by pars (b), (e), (f) and (g) of cl 10(1) in Sched 2 to the Act. All of these paragraphs relate to the matter to be broadcast, not the provenance of the programs broadcast.

26 The provisions of the Act uniformly point to one meaning of "the Australian content of programs", namely, the Australian matter contained in a program. There is neither historical nor textual foundation for the proposition that the term can be used to classify programs by reference to their provenance. The determination of the Australian Content Standard adopts an impermissible basis for classifying programs as the subject of a standard under s 122. It follows that I would hold the Australian Content Standard to be invalid, but for a reason other than the reason advanced by Blue Sky and debated by the ABA and the interveners.

3. Is the Australian Content Standard consistent with s 160(d)?

27 If, contrary to my view, s 122(2)(b) empowered the ABA to determine and prescribe a transmission quota for programs having an Australian provenance, is it consistent with s 160(d)?

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13 s 123(2)(l).

14 By virtue of s 99.

28 Section 160 defines four categories of constraint on the ABA's performance of its functions. The "objects of this Act" in par (a) are to be collected from the terms of the Act. As the particular terms of the Act would prevail over the general requirements of s 160 in any event, the "objects of this Act" requirement in par (a) - but not "regulatory policy" - must prevail over the other requirements in s 160. The "objects of this Act" in par (a) and "Australia's obligations" in par (d) prescribe existing constraints on the ABA's performance of its functions; the constraints imposed by pars (b) and (c) await the notification of general policies or the giving of directions and the constraint of "regulatory policy" awaits the formulation of that policy. As there is nothing which suggests that Parliament contemplated that the four categories of constraints might be inconsistent or incompatible one with another, the policies which may be formulated under par (a) or notified under par (b) and the directions which may be given under par (c) must be consistent with the objects of the Act and with par (d). So construed, there could be no conflict between the constraint created by the objects of the Act or by par (d) and any of the other constraints imposed by s 160. If there were any conflict between "the objects of this Act" and s 160(d) the former would prevail but no such conflict appears in the present case. Section 160(d) therefore prescribes a manner in which the ABA must perform its statutory functions. It has effect according to its tenor.

29 Of course, the ascertainment of Australia's obligations under "any convention to which Australia is a party or any agreement between Australia and a foreign country" may be difficult to ascertain, especially if those obligations are mutually inconsistent. Counsel for the interveners pointed to a number of international instruments which indicate that the conventions and international agreements to which Australia is a party create obligations which, if not mutually inconsistent, at least throw doubt on the proposition that Arts 4 and 5(1) of the Protocol entitle Australian and New Zealand makers of programs to share the market between them and equally. Clearly Parliament did not contemplate that the constraints imposed by s 160(d) could be mutually inconsistent for the entirety of Australia's obligations had to be observed by the ABA in the performance of its functions.

30 Here, Arts 4 and 5(1) express unequivocally Australia's obligations under an agreement "between Australia and a foreign country". Whether or not Australia's obligations under other agreements or conventions restrict the proportion of a market available to Australian and New Zealand service providers, Arts 4 and 5(1) of the Protocol impose an obligation on Australia to extend to New Zealand service providers market access and treatment no less favourable to New Zealand service providers than the market access and treatment available to Australian service providers. As there is nothing to show that Arts 4 and 5(1) do not truly impose obligations on Australia, s 160(d) has the effect of requiring the ABA to perform its functions in a manner consistent with Arts 4 and 5(1).

31 On the hypothesis that the prescription of a transmission quota for programs having an Australian provenance could be supported by an exercise of power conferred by s 122, s 160(d) directs the ABA not to exercise its power so as to

breach Australia's international obligations. On that hypothesis, a majority of this Court, reading s 122 with s 160, holds that[15]:

> "the legal meaning of s 122 is that the ABA must determine standards relating to the Australian content of programs but only to the extent that those standards are consistent with the directions in s 160."

Given the hypothesis, I would respectfully agree. And, as Australian program makers are given an advantage over the New Zealand program makers by cll 7 and 9 of the Australian Content Standard, I would hold those clauses to be inconsistent with s 160(d).

4. Is the Australian Content Standard valid?

32 Although I apprehend that, on the hypothesis stated, the majority and I would hold cll 7 and 9 to be inconsistent with s 160(d) of the Act, my analysis of the consequences is radically different. I must explain the basis on which I proceed.

33 The supposed conflict between s 122 and s 160(d) which a majority of the Federal Court held to exist was not textual; it was operational. There is no textual inconsistency between s 122 and s 160. And an operational conflict could arise only if s 122 conferred a power which required the ABA to determine a standard inconsistent with Australia's obligations under an agreement with another country. Were that the situation, s 122 would prevail because, on that construction of s 122, it would express the Parliament's direction to the ABA to exercise the power it confers in a particular way while s 160 expresses a direction as to the way in which the ABA's functions generally were to be exercised. One of the "objects of this Act" would be expressed by s 122. The special direction contained in s 122 would prevail over the general direction contained in s 160(d)[16]. However, as it is not possible to construe s 122 as containing a direction to the ABA to determine a standard inconsistent with Australia's obligations under an agreement with another country, there is no textual inconsistency between the two provisions. Nor is there any operational inconsistency as it is open to the ABA so to formulate a determination as to afford the same protection to the makers of New Zealand programs as that afforded to the makers of Australian programs. Therefore this question arises: what is the effect of an obligation owed by Australia under an agreement with a foreign country on the ambit of the power conferred on the ABA by s 122?

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15 *Project Blue Sky v Australian Broadcasting Authority*, HCA 28 at 80.

16 *Smith v The Queen* (1994) 181 CLR 338 at 348; *Refrigerated Express Lines (A'asia) Pty Ltd v Australian Meat and Live-stock Corporation* (1980) 29 ALR 333 at 347.

34 A provision conferring a general power and a provision prescribing the manner in which the repository of that power must exercise it have to be read together. In *Colquhoun v Brooks*[17], Lord Herschell said:

> " It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."

When the Parliament confers a power and statutorily directs the manner of its exercise, "[t]he ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains": *Morton v Union Steamship Co of New Zealand Ltd*[18]. Therefore a provision conferring the power must be so construed as to conform with a provision governing the manner of its exercise. The authority conferred on the repository of a general power cannot be exercised in conflict with a provision which governs the manner of its exercise[19]; the constraint on the exercise of the power defines the ambit of the power granted. A purported exercise of a power in breach of the provision which governs the manner of its exercise is invalid, since there is no power to support it.

35 If a statutory instrument is invalid by reason of conflict between the terms of the instrument and a statutory direction as to the manner in which the power to make the instrument may be exercised, the source of the invalidity is the restricted ambit of the power, not the absence of some act or occurrence extrinsic to the statute. A statutory direction as to the manner in which a power may be exercised is not a condition upon the existence of the power or a mere direction as to the doing of some preliminary or collateral act. It is a delimitation of the power itself.

36 If the power exercised by a repository is within the ambit of the power reposed, there can be no unlawfulness on the part of the repository in exercising it. Either there is power available for exercise in the manner in which the repository has exercised it and the exercise is lawful or there is no power available for exercise

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17 (1889) 14 App Cas 493 at 506.

18 (1951) 83 CLR 402 at 410.

19 *Shanahan v Scott* (1957) 96 CLR 245 at 250; *Clyne v Deputy Commissioner of Taxation* (1984) 154 CLR 589 at 597-598; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 561; *Harrington v Lowe* (1996) 70 ALJR 495 at 500-501; 136 ALR 42 at 49; *Utah Construction & Engineering Pty Ltd v Pataky* [1966] AC 629 at 640; *Willocks v Anderson* (1971) 124 CLR 293 at 298-299.

in the manner in which the repository has purported to exercise it and the purported exercise is invalid.

37 A provision which directs the manner of the exercise of a power is quite different from a provision which prescribes an act or the occurrence of an event as a condition on the power - that is, a provision which denies the availability of the power unless the prescribed act is done or the prescribed event occurs. In one case, power is available for exercise by the repository but the power available is no wider than the direction as to the manner of its exercise permits; in the other case, no power is available for exercise by the repository unless the condition is satisfied[20]. A provision which prescribes such a condition has traditionally been described as mandatory because non-compliance is attended with invalidity. A purported exercise of a power when a condition has not been satisfied is not a valid exercise of the power.

38 A third kind of provision must be distinguished from provisions which restrict the ambit of the power and provisions which prescribe conditions on its availability for exercise. A provision may require the repository or some other person to do or to refrain from doing something (sometimes within a period prescribed by the statute) before the power is exercised but non-compliance with the provision does not invalidate a purported exercise of the power[21]: the provision does not condition the existence of the power[22]. Such a provision has often been called directory, in contradistinction to mandatory, because it simply directs the doing of a particular act (sometimes within a prescribed period) without invalidating an exercise of power when the act is not done or not done within the prescribed period. The description of provisions as either mandatory or directory provides no test by which the consequences of non-compliance can be determined; rather, the consequences must be determined before a provision can be described as either mandatory or directory.

39 The terms of the statute show whether a provision governs the manner of exercise of a general power, or is a condition on a power, or merely directs the doing or refraining from doing an act before a power is exercised. The distinction between conditions on a power and provisions which are not conditions on a power is sometimes difficult to draw, especially if the provision makes substantial

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20 See, for example, *Spicer v Holt* [1977] AC 987.

21 *Osborne v The Commonwealth* (1911) 12 CLR 321 at 336-337; *Buchanan v The Commonwealth* (1913) 16 CLR 315 at 329.

22 See, for example, *Clayton v Heffron* (1960) 105 CLR 214 at 246-248; *Simpson v Attorney-General* [1955] NZLR 271; *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286; [1995] 1 All ER 367.

compliance with its terms a condition[23]. Then an insubstantial non-compliance with the same provision seems to give the provision a directory quality, although in truth such a provision would have a dual application: substantial non-compliance is a condition; insubstantial non-compliance is not[24].

40 The question whether a breach of a provision prescribing the doing of some act before a power is exercised invalidates a purported exercise of the power[25] is not, in my respectful opinion, relevant to the present case. We are here concerned not with the availability of a power or the classification of a provision as mandatory or directory but with a provision which determines the ambit of a power which was available for exercise by the ABA.

41 The purpose of construing the text of a statute is to ascertain therefrom the intention of the enacting Parliament. When the validity of a purported exercise of a statutory power is in question, the intention of the Parliament determines the scope of a power as well as the consequences of non-compliance with a provision prescribing what must be done or what must occur before a power may be exercised. If the purported exercise of the power is outside the ambit of the power or if the power has been purportedly exercised without compliance with a condition on which the power depends, the purported exercise is invalid. If there has been non-compliance with a provision which does not affect the ambit or existence of the power, the purported exercise of the power is valid. To say that a purported exercise of a power is valid is to say that it has the legal effect which the Parliament intended an exercise of the power to have.

42 Here, s 160(d) is a provision which directs the manner of the exercise of the powers conferred on the ABA under the Act, including (so far as is relevant) the power conferred by s 122(1)(a). If the ABA purports to exercise its powers in breach of the injunction contained in s 122(4) and s 160(d), to that extent the purported exercise of the power is invalid and the purported standard (or the non-conforming provisions thereof) is invalid and of no effect. The standard cannot be saved by some notion that s 160(d) is "directory". The Act empowers the ABA to

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23 *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 255-256; *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655 at 691-692; cf *R v Inner London Betting Licensing Committee; Ex parte Pearcy* [1972] 1 WLR 421; [1972] 1 All ER 932.

24 Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 253.

25 *Montreal Street Railway Company v Normandin* [1917] AC 170 at 175; *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 161-162, 178-179; *Tasker v Fullwood* [1978] 1 NSWLR 20 at 23-24; *London & Clydeside Estates v Aberdeen District Council* [1980] 1 WLR 182 at 201-202; [1979] 3 All ER 876 at 892-893; *TVW Enterprises v Duffy (No 3)* (1985) 8 FCR 93 at 102; 62 ALR 63 at 71.

determine a program standard that relates to the Australian content of programs only to the extent that the standard is consistent with Australia's obligations under Arts 4 and 5(1) of the Protocol. On the hypothesis that the Australian Content Standard authorises the determination of a standard prescribing a transmission quota for programs having an Australian provenance, cl 9 does not conform with Arts 4 and 5(1). It is therefore invalid.

43 On either view of the meaning of "Australian content" I would allow the appeal. Allowing the appeal, I would set aside the order of the Full Court of the Federal Court and in lieu thereof order that the appeal to that Court be dismissed. The respondent must pay the costs.

44 McHUGH, GUMMOW, KIRBY AND HAYNE JJ. The question in this appeal is whether a program standard[26], known as the Australian Content Standard, made by the respondent, the Australian Broadcasting Authority ("ABA"), is invalid. The appellants contend that it is invalid because it gives preference to Australian television programmes contrary to Australia's obligations under the Australia New Zealand Closer Economic Relations Trade Agreement ("the Trade Agreement") and the Trade in Services Protocol to the Trade Agreement ("the Protocol").

45 The appeal is brought against an order of the Full Court of the Federal Court of Australia (Wilcox and Finn JJ, Northrop J dissenting)[27] which set aside an order made by Davies J in the Federal Court[28]. The order made by Davies J declared that the Australian Content Standard was invalid to the extent that it was inconsistent with the Trade Agreement and the Protocol.

46 The appellants are companies involved in the New Zealand film industry. The ABA was established by the *Broadcasting Services Act* 1992 (Cth) ("the Act")[29] to supervise and control television and radio broadcasting in Australia. Section 158 sets out its primary functions. They include:

> "(j) to develop program standards relating to broadcasting in Australia; and
>
> (k) to monitor compliance with those standards".

The legislation

47 Section 4(1) of the Act declares that Parliament "intends that different levels of regulatory control be applied across the range of broadcasting services

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26 "Program standards" are defined by s 6 of the *Broadcasting Services Act* 1992 (Cth) to mean "standards determined by the ABA relating to the content or delivery of programs".

27 *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465 at 484; 141 ALR 397 at 415.

28 The order of Davies J was made in *Project Blue Sky Inc v Australian Broadcasting Authority* unreported, Federal Court of Australia, 26 August 1996. The reasons for judgment but not the order are reported in *Project Blue Sky Inc v Australian Broadcasting Authority* (1996) 68 FCR 455.

29 s 154.

according to the degree of influence that different types of broadcasting services are able to exert in shaping community views in Australia".

48 Three of the objects of the Act are[30]:

"(d) to ensure that Australians have effective control of the more influential broadcasting services; and

(e) to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity; and

...

(g) to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance".

49 Section 160 declares that:

"The ABA is to perform its functions in a manner consistent with:

(a) the objects of this Act and the regulatory policy described in section 4; and

(b) any general policies of the Government notified by the Minister under section 161; and

(c) any directions given by the Minister in accordance with this Act; and

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30 s 3.

(d) Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country."[31]

50 The appellants contend that par (d) of s 160 required the ABA in determining program standards to comply with the Trade Agreement and the Protocol. They contend that, because the Protocol requires equality of treatment and access to markets, the Australian Content Standard is invalid because it gives television programs made by Australians preferential treatment over programs made by New Zealand nationals.

51 The Act imposes a specific obligation on the ABA to determine program standards to be observed by commercial television broadcasting licensees in respect of the Australian content of television programs. Section 122 states:

"(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.

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31 A number of federal statutes and regulations have provisions similar to s 160(d). See *Air Services Act* 1995 (Cth), s 9(3); *Australian Postal Corporation Act* 1989 (Cth), s 28(c); *Chemical Weapons (Prohibition) Act* 1994, ss 22, 95; *Civil Aviation Act* 1988 (Cth), s 11; *Customs Act* 1901 (Cth), s 269SK; Customs (Prohibited Exports) Regulations, reg 13CA(2); *Endangered Species Protection Act* 1992 (Cth), s 171; Extradition (Ships and Fixed Platforms) Regulations, regs 6(2), 7(2); Hazardous Waste (Regulation of Exports and Imports) Regulations, reg 7(2); *Navigation Act* 1912 (Cth), s 422; *Nuclear Non-Proliferation (Safeguards) Act* 1987 (Cth), s 70(1); *Ozone Protection Act* 1989 (Cth), s 45(5); *Sea Installations Act* 1987 (Cth), s 13; *Telecommunications Act* 1997 (Cth), s 366.

(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."

52 Section 6 defines "program" in relation to a broadcasting service to mean:

"(a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or

(b) advertising or sponsorship matter, whether or not of a commercial kind."

53 Before determining, varying or revoking a standard, the ABA must "seek public comment on the proposed standard or the variation or revocation"[32]. Decisions by the ABA with respect to standards are not decisions under the Act which may be reviewed under s 204 by the Administrative Appeals Tribunal. Instead, the Act gives the Houses of Parliament authority to alter a standard. Section 128(1) provides that, upon either of the Houses of Parliament agreeing to an amendment of a standard which has been determined, the standard has effect as amended from the 28th day after the date on which the other House agrees to the amendment.

54 The Act also provides for the allocation of commercial television broadcasting licences and the conditions of such licences[33] include[34] a requirement that the licensee comply with program standards determined by the ABA. Breaches of licence conditions are offences[35] and may lead to cancellation of a licence by the ABA[36].

55 Pursuant to the power conferred by s 122, the ABA determined the Australian Content Standard on 15 December 1995. It was to become operative from 1 January 1996. Clause 3 declares:

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32 s 126.

33 Set out in Sched 2 of the Act.

34 Sub-cl 7(1)(b) of Sched 2.

35 s 139(1).

36 s 143.

"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."

56 Clause 4 declares:

"This Standard:

(a) sets minimum levels of Australian programming to be broadcast on commercial television; and

(b) requires minimum amounts of first release Australian drama, documentary and children's programs ... to be broadcast on commercial television; and

(c) requires preschool programs broadcast on commercial television to be Australian programs."

57 Clause 5 defines "Australian" to mean "a citizen or permanent resident of Australia". Clauses 5 and 7 define "an Australian program" as one that was "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)" and which was made without financial assistance from a fund administered by the Australian Film Commission. A program complies with sub-cl (2) if the Minister for Communications and the Arts has issued a final certificate under s 124ZAC of the *Income Tax Assessment Act* 1936 (Cth). Such a certificate can only be given with respect to a film which has a significant Australian content[37]. A program complies with sub-cl (3) if it was made pursuant to an agreement between the Australian government or an Australian government authority and the government or a government authority of another country. A program complies with sub-cl (4) if it meets certain criteria ensuring that Australians are primarily responsible for the making of the program and that Australia is the country where the program is produced or post-produced unless that production "would be impractical".

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37 See the definition of "Australian film" in s 124ZAA of the *Income Tax Assessment Act* 1936 (Cth).

58 Clause 9, which is the critical clause for the purposes of this appeal, declares:

> "(1) Subject to subclause (3), until the end of 1997, Australian programs must be at least 50% of all programming broadcast between 6.00am and midnight in a year that was made without financial assistance from the television production fund.
>
> (2) Subject to subclause (3), from the beginning of 1998, Australian programs must be at least 55% of all programming broadcast between 6.00am and midnight in a year that was made without financial assistance from the television production fund.
>
> (3) If an Australian program:
>
> (a) is first release sports coverage; and
>
> (b) begins before midnight and ends on the next day;
>
> the part of the program broadcast between midnight and 2.00am is taken to have been broadcast between 6.00am and midnight."

59 Clauses 10 and 11 deal with Australian drama program requirements, an Australian drama program being defined in cl 5 as an Australian program that meets certain criteria. Clauses 12, 13, 14 and 15 deal with the Australian content of children's programs. Clause 16 requires that at least 10 hours of first release Australian documentary programs be broadcast each year by a licensee.

60 The objects specified in s 3 of the Act make it clear that a primary purpose of the Act is to ensure that Australian television is controlled by Australians for the benefit of Australians. The objects require that the Act should be administered so that broadcastings reflect a sense of Australian identity, character and cultural diversity, that Australians will effectively control important broadcasting services and that those services will provide an appropriate coverage of matters of local significance. However, the direction in s 160(d) contains the potential for conflict with the objects of the Act because it 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 under any agreement between Australia and a foreign country. It is not difficult to imagine treaties entered into between Australia and a foreign country which may be utterly inconsistent with those objects.

61 Furthermore, s 160(b) and s 160(c) respectively require the ABA to perform its functions in accordance with "any general policies of the Government notified by the Minister under s 161" and with "any directions given by the Minister in

accordance with this Act". These provisions also contain the potential for conflicts with the objects of the Act. However, arguably, the Minister cannot notify policies or give directions which attempt "to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends"[38].

62 It is not necessary in this case, however, to decide which of the directions in s 160 is to prevail if, in a particular case, two or more applicable directions are inconsistent with each other. Nothing in the objects of the Act requires the ABA to give preferential treatment to Australian over New Zealand nationals in determining "standards that are to be observed by commercial television broadcasting licensees"[39]. Nor were we referred to any notified policy or ministerial direction to that effect.

The Trade Agreement and the Protocol

63 The Trade Agreement came into force on 1 January 1983. Its object was the expansion of free trade between Australia and New Zealand. In August 1988, the Protocol was signed. It came into effect on 1 January 1989.

64 Article 4 of the Protocol states:

> "Each 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."

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38 *Shanahan v Scott* (1957) 96 CLR 245 at 250; *Peppers Self Service Stores Pty Ltd v Scott* (1958) 98 CLR 606 at 610. See also *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410; *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 at 235; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 369, 380-381.

39 s 122(1)(a).

65 Article 5 states:

> "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."

66 It was common ground between the parties that the provisions of cl 9 of the Australian Content Standard are in conflict with the provisions of Arts 4 and 5 of the Protocol. That being so, two questions arise: (1) is cl 9 of the Australian Content Standard in breach of s 160(d) of the Act; (2) if it is, is cl 9 invalid?

The Federal Court

67 At first instance in the Federal Court, Davies J made a declaration that the Australian Content Standard was invalid to the extent to which it failed to be consistent with the Protocol[40]. His Honour also ordered[41] that "unless the Standard is revoked or varied in accordance with law by [the ABA] on or before 31 December 1996, the Standard is set aside with effect from 31 December 1996".

68 On appeal, the Full Court set aside the orders of Davies J[42]. In a joint judgment Wilcox and Finn JJ held[43] that there was "an irreconcilable conflict between the special provision constituted by s 122(2)(b) of the Act and the general provision of s 160(d), as applied to the [Trade Agreement]" and that s 122(2)(b) must prevail. Northrop J dissented. His Honour was of the opinion that there was no irreconcilable conflict between the two sections. He held[44] that the ABA had failed to comply with the obligations imposed upon it by ss 160(d) and 122(4) of the Act and that the Australian Content Standard was invalid.

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40 *Project Blue Sky Inc v Australian Broadcasting Authority* unreported, Federal Court of Australia, 26 August 1996.

41 Unreported, Federal Court of Australia, 26 August 1996.

42 *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465 at 484; 141 ALR 397 at 415.

43 (1996) 71 FCR 465 at 484; 141 ALR 397 at 414.

44 (1996) 71 FCR 465 at 475; 141 ALR 397 at 406.

Conflicting statutory provisions should be reconciled so far as is possible

69 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In *Commissioner for Railways (NSW) v Agalianos*[47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed[48].

70 A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[49]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions[50]. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give

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45 See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213 per Barwick CJ.

46 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 per Mason and Wilson JJ. See also *South West Water Authority v Rumble's* [1985] AC 609 at 617 per Lord Scarman, "in the context of the legislation read as a whole".

47 (1955) 92 CLR 390 at 397.

48 *Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312 per Gibbs CJ, 315 per Mason J, 321 per Deane J.

49 *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J.

50 See *Australian Alliance Assurance Co Ltd v Attorney-General of Queensland* [1916] St R Qd 135 at 161 per Cooper CJ; *Minister for Resources v Dover Fisheries* (1993) 43 FCR 565 at 574 per Gummow J; 116 ALR 54 at 63.

way to the other"[51]. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

71 Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision[52]. In *The Commonwealth v Baume*[53] Griffith CJ cited *R v Berchet*[54] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

The Australian Content Standard was authorised by the literal meaning of s 122

72 The Australian Content Standard made on 15 December 1995 is plainly a standard that relates to "the Australian content of programs" within the literal and grammatical meaning of s 122(2)(b) of the Act. The term "Australian content" is not defined by s 122 or by the Act. But, given the history of the term, there can be no doubt that the standard made on 15 December 1995 relates to the "Australian content of programs" within the literal meaning of s 122(2)(b) of the Act.

73 Immediately prior to the commencement of the Act "TPS 14 (Australian Content of Television Programs)"[55] was in force. Section 21 of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth) ("the Transitional Provisions Act") deemed TPS 14 to be a standard determined by the ABA under s 122(1)(a) of the Act. It also provided that the provisions of s 114 of the *Broadcasting Act* 1942 (Cth) were to be taken to be program standards in force under that Act relating to the level of Australian content of programs and were continued in force.

74 Clause 1 of TPS 14 declared that the objective of that standard was:

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51 *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360 per Lord Herschell LC.

52 *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ, 419 per O'Connor J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12-13 per Mason CJ.

53 (1905) 2 CLR 405 at 414.

54 (1688) 1 Show KB 106 [89 ER 480].

55 "TPS": Television Program Standard.

"to encourage programs which:

(a) are identifiably Australian;

(b) recognise the diversity of cultural backgrounds represented in the Australian community;

(c) are developed for an Australian audience; and

(d) are produced with Australian creative control."

75 Clause 21 provided that:

"Not less that 35% of the time occupied by programs broadcast by a licensee between the hours of 6.00am and midnight, averaged over the calendar year commencing 1 January 1990, shall be devoted to the broadcasting of Australian programs, including repeats. The percentage requirement shall increase to:

(a) 40% for the calendar year commencing 1 January 1991;

(b) 45% for the calendar year commencing 1 January 1992;

(c) 50% for the calendar year commencing 1 January 1993 and for each calendar year thereafter."

76 Other clauses in TPS 14 spelt out the criteria for determining whether programs qualified for the transmission quota referred to in cl 21. Thus, cl 23 relevantly provided:

"(a) Programs other than drama will qualify in full for the transmission quota if they are:

(i) designed for and relevant to Australian society;

(ii) under Australian creative control; and

(iii) (A) are shot in Australia and all elements of the program have been designed and produced by Australians for an Australian audience; or

> (B) are produced in Australia for an Australian audience but some elements of the program have been made by non-Australians (eg news, current affairs and today programs); or
>
> (C) are shot overseas but with substantial Australian production involvement (eg Australian travel documentaries and sporting events covered on site by Australian interviewers and commentators)."

It is unnecessary to set out the criteria for other programs to qualify as Australian programs for the purpose of cl 21 of TPS 14. It is enough to say that to qualify they had to be identifiably Australian either in their content or in their creation or production.

77 Against the background of TPS 14 and its continuation into force by the Transitional Provisions Act, it is clear that the Australian Content Standard was authorised by the literal meaning of s 122(2)(b).

The legal meaning of s 122

78 However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[56] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation*, Mr Francis Bennion points out[57]:

> "The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there

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56 For example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437.

57 3rd ed (1997) at 343-344.

> would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with." (footnotes omitted)

79 The express words of s 160 require the ABA to carry out its functions in accordance with the directions given by that section. Section 160 therefore provides the conceptual framework in which the functions conferred by s 158 are to be carried out. The function specified in s 158(j) encompasses the direction in s 122 to "determine standards" to be observed by commercial and community television broadcasting licensees. The carrying out of the directions in s 122 is therefore one of the functions of the ABA.

80 If s 122(1) and (2) were given their grammatical meaning, without regard to the provisions of s 160, they would authorise the making of standards which were inconsistent with Australia's obligations under international conventions or under its agreements with foreign countries. However, the express words of s 122(4) and the mandatory direction in s 160 show that the grammatical meaning of s 122(1) and (2) is not the legal meaning of those sub-sections. When s 122 is read with s 160, the legal meaning of s 122 is that the ABA must determine standards relating to the Australian content of programs but only to the extent that those standards are consistent with the directions in s 160. If, by reason of an obligation under a convention or agreement with a foreign country, it is impossible to make an Australian content standard that is consistent with that obligation, the ABA is precluded by s 160 from making the standard, notwithstanding the literal command of s 122(1) and (2). Accordingly, in making the Australian Content Standard in December 1995, the ABA was under an obligation to ensure that the Standard was not inconsistent with the Trade Agreement or the Protocol.

81 The majority judges in the Full Court in the present case were therefore in error in holding that the relationship of s 160 and s 122 is that of a general and a special provision. They are interlocking provisions, with s 160 - the dominant provision - directing how the function conferred by s 122 is to be carried out. The power conferred by s 122 must therefore be exercised within the framework imposed by s 160.

An Australian content standard must be consistent with the Trade Agreement and the Protocol

82 The Trade Agreement and the Protocol are agreements "between Australia and a foreign country" within the meaning of s 160(d). They fall within the ordinary grammatical meaning of that paragraph. Moreover, the Explanatory Memorandum that accompanied the Bill that became the Act stated that clause 160[58]:

> "Requires the ABA to perform its functions in a manner consistent with various matters, including Australia's international obligations or agreements such as Closer Economic Relations with New Zealand."

Accordingly, s 122 prohibits the ABA from making a standard that is inconsistent with the Trade Agreement or the Protocol.

83 No doubt it is a curious feature of the 1992 legislation that, despite the enactment of s 160(d) of the Act, s 21 of the Transitional Provisions Act maintained TPS 14 in force notwithstanding that its provisions were inconsistent with the Protocol and that, for present purposes, its provisions are substantially the same as the Australian Content Standard. However, the continuation in force of TPS 14 provides no ground for holding that s 122 authorises standards that are in conflict with Australia's obligations under the Trade Agreement or the Protocol. The continuation of TPS 14 was probably a stop-gap measure, designed to protect Australian interests, until the ABA promulgated a new standard that was consistent with Australia's international obligations including those under the Trade Agreement and the Protocol. Certainly, the Minister for Transport and Communications was aware that the provisions of TPS 14 might be in conflict with Australia's obligations under the Protocol. In a letter dated 2 December 1992 to the Chairperson of the ABA, the Minister, after referring to s 160 and the Trade Agreement, said:

> "Having consulted with the Minister for Trade and Overseas Development, I am aware that Australia's present treatment of New Zealand produced programming in Australian content Standard TPS14 may be in breach of Australia's Services Protocol obligations. I would hope that the ABA can quickly reconsider the Australian content standard."

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58 *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465 at 483; 141 ALR 397 at 414.

84 Clause 9 of the Australian Content Standard published in December 1995 is plainly in breach of Australia's obligations under Arts 4 and 5 of the Protocol. That is because cl 9 requires Australian programs to constitute 50 per cent (rising to 55 per cent) of programming broadcasts made between 6.00am and midnight. Consequently, Australian programs have an assured market of at least 50 per cent of broadcasting time while New Zealand programs have to compete with all other programs including Australian programs for the balance of broadcasting time. New Zealand programs therefore have less favourable access rights to the market for television programs than Australian programs have. As a result, cl 9 of the Australian Content Standard is in breach of Art 4 (access rights of persons and services to a market to be no less favourable) and Art 5 (treatment of persons and services to be no less favourable) of the Protocol and was therefore made in contravention of s 122(4).

85 It would seem to follow from the conclusion that cl 9 is in breach of the Act that other provisions of the Standard such as cll 10-16, which have a similar effect to cl 9, were also made in breach of s 122(4). However, the Court heard no detailed submissions on the validity of cll 10-16. For the purpose of the present case, it is unnecessary to come to any fixed view about the validity of these clauses. It is sufficient to hold that cl 9 was made in breach of the Act.

86 However, it does not follow that cl 9 of the Standard is void and of no force or effect. A group of Australian companies and persons who were given leave to appear in the proceedings as *amici curiae,* submitted to the Court that, on its proper construction, s 160(d) did not impose any duty on the ABA that would result in the invalidity of any act done in breach of that paragraph. Before turning to this submission, however, it is necessary to discuss the conclusion of the majority judges in the Full Court that, because of the Trade Agreement and the Protocol, in enacting ss 122 and 160[59]:

> "Parliament has given the ABA two mutually inconsistent instructions. It has said, first, that the ABA is to provide for preferential treatment of Australian programs, but, second, that it is to do so even-handedly as between Australia and New Zealand."

87 With great respect to their Honours, the Parliament has done no such thing. The Parliament has not said that the ABA must give preferential treatment to Australian programs. It has said that the ABA must determine standards that

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59 *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465 at 483; 141 ALR 397 at 414.

"relate to ... the Australian content of programs"[60]. The words "relate to" are "extremely wide"[61]. They require the existence of a connection or association[62] between the content of the Standard and the Australian content of programs. What constitutes a sufficient connection or association to form the required relationship is a matter for judgment depending on the facts of the case. No doubt the association or connection must be a relevant one in the sense that it cannot be accidental or so remote that the Standard has no real effect or bearing on the Australian content of programs. But, without attempting to provide an exhaustive definition, once the Standard appears to prohibit, regulate, promote or protect the Australian content of television broadcasts the required relationship will exist. Furthermore, the fact that the Standard also deals with matters other than the Australian content of programs will not necessarily negate the existence of a relevant relationship. A standard can relate to the Australian content of programs although it also regulates other matters[63]. Section 158(j) gives the ABA power to develop program standards relating to broadcasting including those standards referred to in s 122. There is nothing in the Act to prevent the ABA from utilising the power conferred by s 158(j) to determine program standards in a general way and at the same time carry out its obligation to determine the Australian content of programs.

88 Nor is there anything in the Act - including the combined effect of s 160 and the Trade Agreement - which prevents the ABA from determining a standard relating to the Australian content of programs in cases where preferential treatment cannot be given to Australian programs. The phrase "the Australian content of programs" in s 122 is a flexible expression that includes, inter alia, matter that reflects Australian identity, character and culture. A program will contain Australian content if it shows aspects of life in Australia or the life, work, art, leisure or sporting activities of Australians or if its scenes are or appear to be set

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60 s 122(2)(b).

61 *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620 per Taylor J.

62 *Perlman v Perlman* (1984) 155 CLR 474 at 484. See also *R v Ross-Jones; Ex parte Beaumont* (1979) 141 CLR 504 at 510; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 196-197; *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 367, 376.

63 cf *Herald and Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 434; *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 11, 19-20; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 151.

in Australia or if it focuses on social, economic or political issues concerning Australia or Australians. Given the history of the concept of Australian content as demonstrated by the provisions of TPS 14, a program must also be taken to contain Australian content if the participants, creators or producers of a program are Australian. Nothing in the notion of the Australian content of programs requires, however, that a standard made pursuant to s 122 must give preference to Australian programs. Nor does the phrase "the Australian content of programs" in s 122 require that such programs should be under Australian creative control.

89 Absent s 160(d), a standard containing cl 9 and similar clauses of the Australian Content Standard would plainly be valid. But it is a fallacy to suppose that a standard that does not provide preference for Australian programs is not a standard that relates to the Australian content of programs. The ABA has complete authority to make a standard that relates to the Australian content of programs as long as the standard does not discriminate against persons of New Zealand nationality or origin or the services that they provide or against the members of any other nationality protected by agreements similar to those contained in the Protocol. Subject to s 160, the form that standard takes is a matter for the ABA.

90 It is of course true that one of the objects of the Act is "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity"[64]. But this object can be fulfilled without requiring preference to be given to Australian programs over New Zealand programs. Thus, the ABA could determine a standard that required that a fixed percentage of programs broadcast during specified hours should be either Australian or New Zealand programs or that Australian and New Zealand programs should each be given a fixed percentage of viewing time. Such a standard would relate to the Australian content of programs even though it also dealt with the New Zealand content of programs. In any event, the existence of the object referred to in s 3(e) cannot control the dominating effect of s 160(d). That paragraph and s 122(4) insist that any program made under s 122 must be consistent with Australia's agreements with foreign countries. The Trade Agreement and the Protocol constitute such an agreement.

Does the failure to comply with s 160 mean that cl 9 of the Australian Content Standard is invalid?

91 An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails

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64 s 3(e).

to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied[65]; there is not even a ranking of relevant factors or categories to give guidance on the issue.

92 Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority[66]. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition[67]. Cases falling within the second category are traditionally classified as directory rather than mandatory. In *Pearse v Morrice*[68], Taunton J said "a clause is directory where the provisions contain mere matter of direction and nothing more". In *R v Loxdale*[69], Lord Mansfield CJ said "[t]here is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory". As a result, if the statutory condition is

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65 *Howard v Bodington* (1877) 2 PD 203 at 211 per Lord Penzance.

66 See, for example, *R v Loxdale* (1758) 1 Burr 445 [97 ER 394]; *Bowman v Blyth* (1856) 7 El & Bl 26 [119 ER 1158]; *Thwaites v Wilding* (1883) 12 QBD 4; *Edwards v Roberts* [1891] 1 QB 302; *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369; *R v Murray; Ex parte Proctor* (1949) 77 CLR 387; *Sutherland Shire Council v Finch* (1970) 123 CLR 657; *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81; *Mark v Australian Broadcasting Tribunal* (1991) 32 FCR 476; 108 ALR 209.

67 *Townsend's Case* (1554) 1 Plowden 111 [75 ER 173]; *Stradling v Morgan* (1560) 1 Plowden 199 [75 ER 305]; *Maloney v McEacharn* (1904) 1 CLR 77; *SS Constructions Pty Ltd v Ventura Motors Pty Ltd* [1964] VR 229; *Public Prosecutor v Oie Hee Koi* [1968] AC 829; *Cullimore v Lyme Regis Corp* [1962] 1 QB 718; *Sandvik Australia Pty Ltd v Commonwealth of Australia* (1989) 89 ALR 213.

68 (1834) 2 Ad & E 84 at 96 [111 ER 32 at 37].

69 (1758) 1 Burr 445 at 447 [97 ER 394 at 395].

regarded as directory, an act done in breach of it does not result in invalidity[70]. However, statements can be found in the cases to support the proposition that, even if the condition is classified as directory, invalidity will result from non-compliance unless there has been "substantial compliance" with the provisions governing the exercise of the power[71]. But it is impossible to reconcile these statements with the many cases which have held an act valid where there has been no substantial compliance with the provision authorising the act in question. Indeed in many of these cases, substantial compliance was not an issue simply because, as Dawson J pointed out in *Hunter Resources Ltd v Melville*[72] when discussing the statutory provision in that case:

> "substantial compliance with the relevant statutory requirement was not possible. Either there was compliance or there was not."

93 In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood*[73] in criticising the continued use of the "elusive distinction between directory and mandatory requirements"[74] and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on

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70 *Stallwood v Tredger* (1815) 2 Phill Ecc 287 [161 ER 1147]; *R v Leicester* (1827) 7 B & C 6 [108 ER 627]; *Catterall v Sweetman* (1845) 9(1) Jur 951; *R v Lofthouse* (1866) LR 1 QB 433; *Montreal Street Railway Co v Normandin* [1917] AC 170 at 174-175; *Clayton v Heffron* (1960) 105 CLR 214 at 247; *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454.

71 *Woodward v Sarsons* (1875) LR 10 CP 733 at 746-747; *Caldow v Pixell* (1877) 2 CPD 562 at 566-567; *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 255-256.

72 (1988) 164 CLR 234 at 249.

73 [1978] 1 NSWLR 20 at 23-24. See also *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 161-162 per Gibbs J.

74 *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119 at 146 per Gummow J.

other grounds. The classification is the end of the inquiry, not the beginning[75]. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales[76]. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute"[77].

An act done in breach of s 160 is not invalid

94 Section 160 proceeds on the hypothesis that the ABA has power to perform certain functions and directs that it "is to perform" those functions "in a manner consistent with" the four matters set out in the section. In the present case, for example, s 158(j) as well as s 122 authorised the making of a standard relating to the Australian content of television programs. Thus, the making of an Australian content standard was not outside the powers granted to the ABA[78] even though, as we have concluded, cl 9 of the Standard was made in breach of the Act. The fact that s 160 regulates the exercise of functions already conferred on the ABA rather than imposes essential preliminaries to the exercise of its functions strongly

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75 *McRae v Coulton* (1986) 7 NSWLR 644 at 661; *Australian Capital Television* (1989) 86 ALR 119 at 147.

76 *Hatton v Beaumont* [1977] 2 NSWLR 211 at 213, 226; *Attorney-General (NSW); Ex Rel Franklins Stores Pty Ltd v Lizelle Pty Ltd* [1977] 2 NSWLR 955 at 965; *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24; *National Mutual Fire Insurance Co Ltd v Commonwealth of Australia* [1981] 1 NSWLR 400 at 408; *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93 at 102; 62 ALR 63 at 71; *McRae v Coulton* (1986) 7 NSWLR 644 at 661 and see *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457-460; *Yates Security Services Pty Ltd v Keating* (1990) 25 FCR 1 at 24-26; 98 ALR 68 at 90-92. See also two recent decisions of the Court of Appeal of the Supreme Court of the Northern Territory: *Johnston v Paspaley Pearls Pty Ltd* (1996) 110 NTR 1 at 5; *Collins Radio Constructions Inc v Day* (1997) 116 NTR 14 at 17; and *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 at 1294, 1296; [1995] 1 All ER 367 at 375, 377.

77 *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24.

78 cf *Mark v Australian Broadcasting Tribunal* (1991) 32 FCR 476; 108 ALR 209.

indicates that it was not a purpose of the Act that a breach of s 160 was intended to invalidate any act done in breach of that section.

95 That indication is reinforced by the nature of the obligations imposed by s 160. Not every obligation imposed by the section has a rule-like quality which can be easily identified and applied. Thus, s 160 requires the functions of the ABA to be performed in a manner consistent with:

- the objects of the Act and the regulatory policy described in s 4;
- any general policies of the Government notified by the Minister under s 161;
- any directions[79] given by the Minister in accordance with the Act.

In particular situations, it is almost certain that there will be room for widely differing opinions as to whether or not a particular function has been carried out in accordance with these policies or general directions. When a legislative provision directs that a power or function be carried out in accordance with matters of policy, ordinarily the better conclusion is that the direction goes to the administration of a power or function rather than to its validity[80].

96 Furthermore, while the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate language[81] as the result of compromises made between the contracting State parties[82]. Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed. The problems that might arise if the performance of any function of the ABA carried out in breach of Australia's international obligations was invalid are compounded by Australia being a party to about 900 treaties[83].

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79 Except as otherwise specified in the Act, the directions are to be only of a general nature (s 162).

80 cf *Broadbridge v Stammers* (1987) 16 FCR 296 at 300; 76 ALR 339 at 343.

81 Bennion, *Statutory Interpretation*, 2nd ed (1992) at 461.

82 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381 at 397; 142 ALR 331 at 352.

83 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 316.

97 Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act[84]. Having regard to the obligations imposed on the ABA by s 160, the likelihood of that body breaching its obligations under s 160 is far from fanciful, and, if acts done in breach of s 160 are invalid, it is likely to result in much inconvenience to those members of the public who have acted in reliance on the conduct of the ABA.

98 Among the functions of the ABA, for example, are the allocation and renewal of licences[85] and the design and administration of price-based systems for the allocation of commercial television and radio broadcasting licences[86]. It is hardly to be supposed that it was a purpose of the legislature that the validity of a licence allocated by the ABA should depend on whether or not a court ultimately ruled that the allocation of the licence was consistent with a general direction, policy or treaty obligation falling within the terms of s 160. This is particularly so, given that the "general policies of the Government notified by the Minister under section 161" unlike the "directions given by the Minister in accordance with this Act"[87] are not required to be publicly recorded and that even those with experience in public international law sometimes find it difficult to ascertain the extent of Australia's obligations under agreements with other countries. In many cases, licensees would have great difficulty in ascertaining whether the ABA was acting consistently with the obligations imposed by s 160. Expense, inconvenience and loss of investor confidence must be regarded as real possibilities if acts done in breach of s 160 are invalid.

99 Because that is so, the best interpretation of s 160 is that, while it imposes a legal duty on the ABA, an act done in breach of its provisions is not invalid.

100 In a case like the present, however, the difference between holding an act done in breach of s 160 is invalid and holding it is valid is likely to be of significance only in respect of actions already carried out by, or done in reliance

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84 *Montreal Street Railway Co v Normandin* [1917] AC 170 at 175; *Clayton v Heffron* (1960) 105 CLR 214 at 247; *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93 at 104-105; 62 ALR 63 at 73-74.

85 s 158(c).

86 s 158(e).

87 See s 162(2) which required the Minister to "cause a copy of each direction given to the ABA to be published in the *Gazette* as soon as practicable after giving the direction".

on the conduct of, the ABA. Although an act done in contravention of s 160 is not invalid, it is a breach of the Act and therefore unlawful. Failure to comply with a directory provision "may in particular cases be punishable"[88]. That being so, a person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action.

Order

101 The appeal to this Court from the Full Court of the Federal Court should be allowed with costs. However, that Court was correct in allowing the appeal from the orders of Davies J because his Honour had held that the Australian Content Standard was invalid to the extent that it was inconsistent with the Trade Agreement and the Protocol. Order 1 of the Full Court's orders should therefore stand. In lieu of the orders made by the Full Court, however, there should be substituted the following orders:

1. The appeal be allowed and the orders made by Davies J set aside.

2. THE COURT DECLARES THAT cl 9 of the Australian Content Standard (the Standard) determined by the Appellant on 15 December 1995 was unlawfully made.

3. THE APPELLANT pay the costs of the appeal and of the proceedings before Davies J.

4. Each party has liberty to apply further, as it may be advised.

5. Without limiting the generality of Order 4, the Respondents have liberty to apply for such further or other orders as they may be entitled to arising from the alleged failure of a clause of the Standard to comply with Australia's obligations under the Australia New Zealand Closer Economic Relations Trade Agreement and the Trade in Services Protocol to that agreement.

6. There be no order in relation to the costs of the interveners.

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88 *Simpson v Attorney-General* [1955] NZLR 271 at 281; *Montreal Street Railway Co v Normandin* [1917] AC 170 at 175.

McHugh J
Gummow J
Kirby J
Hayne J