11

Cross Border Trade in Services

Introduction

11.1 Chapter 10 of the Agreement adopts a three-pronged definition of 'cross-border trade in services' (CBTS). It is the supply of a service

- from the territory of one Party to the territory of the other Party
- in the territory of one Party by a person from that Party to a person from the other Party or
- by a natural person of a Party in the territory of the other Party.[1]

11.2 According to the National Interest Analysis (NIA), the Services Chapter

> binds liberal access for Australian service suppliers, including for professional, business, education, environmental, financial and transport services. A framework to promote mutual recognition of professional services has been developed.[2]

11.3 The Regulatory Impact Statement (RIS) explains that the US regulatory regime is currently bound across most service sectors. Under the Agreement, the US cannot introduce more restrictive measures than those currently in place. There are a range of measures listed in the Agreement, whereby the US unilaterally liberalises these

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1 DFAT, *Guide to the Agreement,* p. 45.

2 NIA, para. 8.

provisions, such level of liberalisation will become bound under the Agreement. The RIS states that this will

> benefit important Australian services exports, such as financial and legal services, as well as other professional services such as engineering, architecture and accounting, by guaranteeing liberal access to the US market.[3]

11.4 This Report will consider Chapter 10 in two sections: first, it will detail the substantive provisions in the Chapter, relating to professional and public services; second, it will focus on the audiovisual sector, particularly in regard to local content requirements under the AUSFTA. This second section will largely cover the effects of Annex I and Annex II to the Agreement.

Professional and public services

Background

11.5 The Committee notes the importance of the services sector for both the Australian and US economies, and the gains to be made for that sector under the Agreement. As the Business Council of Australia stated

> as two mature economies, Australia and the US rely increasingly on the production and trade of services to support their growth and welfare. The services sectors in both economies generate between 70 and 80 percent of GDP. Services industries generate most new jobs in today's advanced economies. The United States has the largest and most competitive services sector in the world and the Australian economy can benefit from closer integration in that market … AUSFTA enhances both growth and employment in the Australian services sector. The Agreement ensures that Australian service providers receive treatment equal to other foreign service providers in the US. Progress in multilateral services liberalisation involving the US has been slow and modest. Legal benefits for the service sector under AUSFTA are immediate and comprehensive.[4]

3 RIS, p. 7.

4 Business Council of Australia, *Submission 132*, p. 3.

11.6 Despite this support for the Chapter, the Committee has heard a variety of concerns relating to its impact on the Australian services sector, including disappointment with the Chapter, claiming that it did not go far enough. The Queensland Government stated

> the Queensland Government is disappointed that the AUSFTA chapter on services does not offer significant overall gains in the immediate term. For the most part, the agreement binds current levels of non-conformity with the obligations of the chapter representing a 'status quo' trade position in relation to services.[5]

11.7 In addition, the Committee received evidence expressing concern over the impact of the Agreement on the ability of governments to regulate in the public interest. These concerns will be considered in detail below.

Scope and coverage

11.8 The CBTS Chapter applies to measures adopted or maintained by a Party that affect cross-border trade in services by a service supplier of the other Party.[6]

11.9 The Chapter adopts what has been termed a 'negative list' approach, in that all measures not specifically reserved fall within the scope of the Chapter.

11.10 This approach has raised some concern among the public, particularly as it differs from the 'positive list' approach used in the GATS provisions.[7]

Core obligations

Non-discrimination

11.11 Chapter 10 imposes obligations on both Parties to accord National Treatment and Most-Favoured Nation (MFN) Treatment to services and service suppliers of the other Party.[8]

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5 Queensland Government, *Submission 206,* p. 10.

6 AUSFTA, Article 10.1.1.

7 Mr Andrew Stoler, *Transcript of Evidence,* 22 April 2004, p. 19; Ms Sharan Burrows, *Transcript of Evidence*, 20 April 2004, p. 48; Ms Theodora Templeton, *Transcript of Evidence*, 5 May 2004, p. 34.

8 DFAT, *Guide to the Agreement,* p. 46.

11.12 Under the National Treatment provision of Article 10.3, Parties must 'accord to service suppliers of the other Party treatment no less favourable than it accords, in like circumstances, to its own service suppliers.'

11.13 Article 10.3 states that Parties are to extend MFN treatment to suppliers of the other Party. That is, it shall treat them no less favourably than it does service suppliers of a non-party, in like circumstances.

11.14 The Australian Services Roundtable criticised the provisions as limited[9], but admitted that it was difficult to ascertain their full benefit because of the negative list approach. Ms Jane Drake-Brockman stated that

> national treatment is a very important thing to achieve for all service providers. To what extent is this a significant achievement? The answer to that is: to what extent we have achieved in this agreement bindings from the US for national treatment that we did not already have under the WTO General Agreement on Trade in Services. Because the FTA has a negative list approach and the WTO has a positive list approach, it requires some analysis to actually work out the answer to that question. It is clear that in the case of the United States we have achieved national treatment on half a dozen or so sectors that we did not have national treatment commitments to in the WTO—some aspects of transport, some aspects of communication, certain business services, some aspects of R&D, education; it would require me to make further analysis, but some aspects of environmental services and energy services also.[10]

11.15 Ms Drake-Brockman also advised that Australia had entered into bindings in relation to water supply, postal and courier services, above its WTO commitments.[11]

11.16 However, the Committee notes evidence received in support of these provisions, stating that they represent 'substantial practical benefits to Australian services exporters'[12] and are a

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9 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 92-93.

10 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 92-93.

11 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 92-93.

12 Australian Pensioners and Superannuants League, *Submission 30,* p. 13.

> potentially significant acceleration of liberalisation for those services where no such commitment was given under the World Trade Organisation (WTO) General Agreement on Trade in Services.[13]

11.17 On this basis, the Committee notes the achievements made for Australian service suppliers under the MFN and national treatment provisions.

Market access

11.18 Under Article 10.4(a), Parties are prohibited from placing limits, either on the basis of a regional subdivision or on the basis of its entire territory, on:

- the number of service suppliers
- the value of service transactions or assets
- the number of service operations or the quantity of services output, or
- the number of natural persons that may be employed in a particular service sector or that a service supplier may employ.[14]

11.19 Article 10.4(b) prohibits Parties from restricting or placing requirements on the type of legal entity through which a supplier may supply a service. The Committee heard evidence that

> the market access obligation which is intended to prevent quantitative restrictions (such as caps on the number of providers permitted to operate in a particular sector) appears to have been made somewhat redundant due to the reservation that both parties have taken.[15]

11.20 However, the Committee notes that, whilst the Agreement did not achieve increased market access for suppliers for providers of professional services, evidence suggests it provides

> frameworks for improving a range of areas. We believe that is a foot in the door, an important gain and above what we would have got through, say, the WTO process.[16]

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13 Australian Chamber of Commerce and Industry, *Submission 133,* p. 1.

14 DFAT, *Guide to the Agreement,* p. 47.

15 Queensland Government, *Submission 206,* p. 10.

16 Ms Freya Marsden, *Transcript of Evidence,* 20 April 2004, p. 101.

Local presence

11.21 Under Article 10.5, Parties are prohibited from requiring that service suppliers of the other Party establish or maintain a representative office or any form of enterprise in its territory, or that it be a resident in its territory, as a condition for the cross-border supply of a service.

Non-conforming measures

11.22 Article 10.6 allows Parties to maintain or adopt measures that are not consistent with the market access, national treatment, MFN treatment and local presence provisions. Such measures are identified in Schedules for each Party contained in Annex I and Annex II to the Agreement.

11.23 Issues arising in relation to regulation in the public interest under this Article are discussed below. The section on Local Content deals with the non-conforming measures for the audiovisual sector.

Domestic regulation

11.24 Article 10.7.1 provides that where a Party requires a service supplier to be authorised in order to supply such service, the competent authorities of that Party must, within a reasonable period of time after submission of a completed application, inform the applicant of the decision concerning the application.[17]

11.25 Article 10.7.2 requires that 'a Party do its best to make sure that authorisation requirements do not create unnecessary barriers to trade in services.'[18] It must 'endeavour to ensure' that its requirements are

a) based on objective and transparent criteria, such as competence and the ability to supply the service;

b) not more burdensome than necessary to ensure the quality of the service; and

c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.[19]

11.26 Article 10.7.3 provides that if new obligations in respect of domestic regulation arise through GATS or other international negotiations in

17 AUSFTA, Article 10.7.1; DFAT, *Guide to the Agreement,* pp. 48-49.

18 DFAT, *Guide to the Agreement,* p. 49.

19 AUSFTA, Article 10.7.2.

which both Parties participate, then Article 10.7 will be amended to incorporate these.

11.27 Ms Drake-Brockman stated that Article 10.7

> is limited in scope, but the fact that it is included at all is an achievement for the Australian government because it is not something which the US government would naturally have wanted to include. [20]

11.28 The Committee notes concerns raised in relation to the criteria in Article 10.7.2. These will be discussed below in relation to public interest regulation.

Transparency in development and application of regulations

11.29 Article 10.8 exists in addition to obligations on transparency in Chapter 20 of the Agreement. Article 10.8.1 requires that Parties 'maintain or establish appropriate mechanisms for responding to inquiries from interested persons regarding the regulations relating to the subject matter of this Chapter'.

11.30 If a Party does not give advance notice of, and opportunity to comment on, proposed new laws, regulations, procedures or rulings in relation to a matter in the CBTS Chapter, as it is required to do under Chapter 20, then, under Article 10.8.2, it must explain why it did not do so.

11.31 Under Article 10.8.3, each time a Party adopts final regulations relating to Chapter 10, it must, where possible, give a written response to 'substantive' comments received in relation to the proposed regulation.[21]

11.32 Parties must provide notice of the requirements of final regulations before they come into effect, where possible.[22]

Transfers and payments

11.33 Under Article 10.10.1, Parties must permit all transfers and payments relating to the cross-border supply of services to be made freely and without delay into and out if its territory. Article 10.10.2 provides that Parties must allow such transfers and payments to be 'made in a

20 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 93-94.

21 DFAT, *Guide to the Agreement*, p. 49.

22 AUSFTA, Article 10.8.4.

freely useable currency … at the prevailing market rate of exchange.'[23] Under Article 10.10.3, a Party can still 'prevent or delay such transfers through the equitable, non-discriminatory, and good faith application' of various laws, including those relating to bankruptcy, insolvency, dealings in securities, and criminal or penal offences.

Express delivery services

11.34 'Express delivery services' are defined under Article 10.12.1 as 'the collection, transport and delivery of documents, printed matter, parcels and other goods on an expediated basis while tracking and maintaining the control of the items throughout the supply of the service.' Air transport services, services supplied in the exercise of government authority and maritime transport services are not included, and nor are services reserved exclusively for supply by Australia Post.[24]

11.35 Under Article 10.12.2, where one Party believes that the other is not maintaining the level of market access for express delivery services that existed at the time the FTA was signed, then the Parties must consult, and the other Party must provide information in response to inquiries about the level of access and other related matters.[25]

11.36 Each Party confirms its intention to prevent the use of revenues derived from its monopoly postal services to confer an advantage to its own or any other suppliers' express delivery service in a manner inconsistent with the Party's law and practice in relation to the monopoly supply of postal services.[26]

Denial of benefits

11.37 Under Article 10.11, the benefits of the Chapter may be denied to a service supplier of the other Party where the service supplier is an enterprise owned by persons of a non-Party, with whom the denying Party does not maintain diplomatic relations, or has in place sanctions with the non-Party or the person of the non-Party that prohibit transactions with the enterprise.[27]

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23 DFAT, *Guide to the Agreement,* pp. 50-51.

24 AUSFTA, 10.12.2, and Footnote 10- 2.

25 DFAT, *Guide to the Agreement,* p. 51.

26 DFAT, *Guide to the Agreement,* p. 51.

27 DFAT, *Guide to the Agreement,* p. 51.

11.38 A party may also deny benefits conferred under Chapter 10 to a service supplier of the other party where that supplier is an enterprise is owned or controlled by persons of a non-Party or of the denying Party, and has no substantial business activities in the territory of the other Party.[28]

Movement of people

11.39 A particular disappointment noted by the Committee is that the Agreement did not make any progress on lowering barriers to the movement of business people.[29] The Committee received much evidence on the difficulties that face Australian service providers in gaining entry to the United States. Ms Drake-Brockman of the Australian Services Roundtable stated that such difficulty

> has been the experience of a number of different professional service bodies. That is quite consistent. That leads me to comment, if I may, on the absence of a chapter in the FTA on temporary movement of businesspeople, which the services industries were very much looking for. The Australian government also fought very hard to achieve that but was unable to do so, given the security priorities in the United States. Nevertheless, as I have said, if what we are looking for in this agreement is real, new market access opportunity by which to measure some substantial positive impact then the absence of that chapter is really a concern and a problem. In the service industries, firstly, you have to get over the border—you have to get your visa—and, secondly, you have to be able to deliver your service.[30]

11.40 Similarly, Mr Ian Peek of the CPA Australia stated that

> In the survey that we have done of our members, especially those who are working over in the US, we saw that the issues about entry and access to the US both for themselves in terms of securing work visas and for their partners continue to be significant.[31]

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28 AUSFTA, 10.11.2 ; DFAT, *Guide to the Agreement*, p. 51.

29 See Mr Alan Oxley, *Transcript of Evidence*, 19 April 2004, pp. 25-26; Mr Rob Durie, *Transcript of Evidence*, 19 April 2004, p. 28; Ms Karen Hall, *Transcript of Evidence*, 23 April 2004, p. 15; Mr Rob Rawson, *Transcript of Evidence*, 4 May 2004, p. 46; WA Government, *Submission 128*, p. 6; Queensland Government, *Submission 206*, p. 11.

30 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 94.

31 Mr Ian Peek, *Transcript of Evidence*, 20 April 2004, p. 53.

11.41 Several witnesses also felt that the lack of progress on this issue was a result of the current security environment.[32] However the Committee also received evidence that the reason this was not included in the Agreement was due to a strong congressional view that the movement of business people should not be part of free trade agreements, as it was out of the jurisdiction of the trade negotiators.

11.42 The Committee feels that this issue needs to be progressed as a matter of urgency, within the Professional Services Working Group (see recommendation at paragraph 11.56).

Mutual Recognition

11.43 Countries may require the fulfilment of certain conditions, such as authorisation, licensing or certification, before a service supplier is authorised to supply a service. Countries may recognise, through formal agreements or unilaterally, the education or experience obtained in another country, or the meeting of that country's requirements or granting of its licences or certifications.[33]

11.44 Under Article 10.9.1, Parties are not prevented from extending such recognition to persons of other countries. However, under Article 10.9.4, such recognition must not constitute 'a means of discrimination between countries in the application of its requirements'[34] or a 'disguised recognition on trade in services'.[35]

11.45 Where a Party extends such recognition to persons of a non-Party, it is not required to accord similar recognition to persons of the other Party under MFN Treatment obligations.[36] It must, however, give the other Party an opportunity to demonstrate that it should also be granted such recognition.[37]

11.46 Article 10.9.5 and Annex I0-A provide a formal mechanism by which the two Parties can encourage recognition of their licensing or certification of professional suppliers.[38]

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32 Mr Rob Rawson, *Transcript of Evidence*, 4 May 2004, p. 46; Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, pp. 93-94; Mr Ian Peek, *Transcript of Evidence*, 20 April 2004, p. 53; Mr Alan Oxley, *Transcript of Evidence*, 19 April 2004, pp. 25-26.

33 DFAT, *Guide to the Agreement*, p. 50.

34 DFAT, *Guide to the Agreement*, p. 50.

35 DFAT, *Guide to the Agreement*, p. 50.

36 AUSFTA, 10.9.2; DFAT, *Guide to the Agreement*, p.50.

37 AUSFTA, 10.9.3, DFAT, *Guide to the Agreement*, p. 50.

38 DFAT, *Guide to the Agreement*, p. 50.

11.47 The Committee heard a number of different opinions on the issue of mutual recognition. The Australian Vice-Chancellors' Committee explained the current situation with regard to professional recognition.

> Australian educated and trained professionals in many fields often experience considerable difficulty in having their qualifications and experience acknowledged and accepted by US professional organisations, institutions, and licensing bodies. These restrictions tend to be enshrined in professional, state or federal regimes. There are also similar issues in reverse for US graduates gaining recognition in Australia.[39]

11.48 The Australian Chamber of Commerce and Industry expressed support for the Agreement, stating that the outcome under the CBTS Chapter would mean that

> an Australian services exporter whose qualifications are recognised in Australia — for example, architects, engineers, lawyers and medical practitioners — will have an entitlement to practice in the United States.[40]

11.49 The Committee received evidence that the Agreement did not go far enough in relation to the difficulties faced by Australian professionals in gaining recognition across the US state regulatory regimes. CPA Australia detailed to the Committee the experience of its members.

> One of the major problems for our members who are eligible to practise in the US under our reciprocity agreement—and which was raised earlier this morning—is the current US state based licensure and practise rules, which are different for each state. A US CPA who registers with CPA Australia can work anywhere in Australia—that is, they enjoy national recognition. In contrast, the Australian CPA who meets all their qualification requirements then faces the problem of being recognised in a particular state.
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> The problem arises because, while the states accept the US uniform CPA exam as the basis for practising in the US, for Australians it is different. The international qualifying exam, which the US sets, is not accepted by all states in the US. At

39 Australian Vice-Chancellors' Committee, *Submission 189*, p. 13.

40 Australian Chamber of Commerce and Industry, *Submission 133*, p. 1.

> present, 31 of the 50 states will accept our members who meet these specified requirements. [41]

11.50 Ms Drake-Brockman supported that claim, agreeing that

> it is very difficult for professional service providers to operate. The FTA does not do anything immediately about those issues, nor could it. However, the inclusion of this article does indicate to the US government that Australia is serious about pushing this envelope and it would like both governments to help industry to push that envelope. We would have to say that we are pleased to have this new process in place; it does not deliver us anything today, but we have a process.[42]

11.51 In support of the outcome regarding mutual recognition, Mr Alan Oxley of the Australian Business Group for a Free Trade Agreement with the United States stated that the Agreement creates a framework to address the issue, which

> was probably the only way to do it. If you held up the agreement to secure a negotiation on mutual or cross-recognition of all of these professional qualifications, it would probably have taken 20 years to negotiate ... There is a framework agreement which now creates a process to do it. In this respect, I think that the acid test will come from people watching it—the scrutiny from parliament and the private sector seeing that the government actually makes an effort to give this thing a bit of a push-along. It is just the sort of thing that could actually die through being an endless bureaucratic process.[43]

Professional Services Working Group

11.52 Annex 10-A provides for the establishment of the Professional Services Working Group. The Working Group must report to the Parties within two years of the entry into force of the Agreement, with any recommendations for initiatives to promote mutual recognition of standards and criteria.[44]

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41 Mrs Ann Johns, *Transcript of Evidence*, 20 April 2004, p. 51.

42 Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 94.

43 Mr Alan Oxley, *Transcript of Evidence*, 20 April 2004, pp. 26-27.

44 AUSFTA, Annex 10-A.9 ; DFAT, *Guide to the Agreement*, p. 50.

11.53 The Working Group will look at the provision of professional services, focusing particularly on 'exploring ways to foster the development of mutual recognition arrangements among the relevant professional bodies, and on the scope to develop model procedures for the licensing and certification of professional service suppliers.'[45]

11.54 Evidence received by the Committee related largely to the possibility of progress on the issues of mutual recognition and the movement of people, through the Working Group Framework.[46]

11.55 Notwithstanding the failure of the CBTS Chapter to address these issues, the Committee heard wide support for the establishment of the Working Group.[47] It was described as a key outcome of the Agreement, the most important of all consultative processes established.[48]

11.56 The Committee notes statements received that the success of the Working Group will depend upon the Parties to encourage consultation between professional bodies.[49]

Recommendation 10

The Committee recommends that the issues of mutual recognition of qualifications and movement of business people be made a priority within the Professional Services Working Group.

45 DFAT, *Guide to the Agreement,* p. 50.

46 Ms Melinda Cilento, *Transcript of Evidence*, 20 April 2004, p. 101; Ms Freya Marsden, *Transcript of Evidence*, 20 April 2004, p. 102; Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 13; Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 94; Business Council of Australia, *Submission 132*, p. 4; Australian Vice-Chancellors' Committee, *Submission 189*, p. 13; Queensland Government, *Submission 206*, p. 10.

47 Ms Melinda Cilento, *Transcript of Evidence*, 20 April 2004, p. 101; Ms Freya Marsden, *Transcript of Evidence*, 20 April 2004, p. 102; Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 13; Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 94; Business Council of Australia, *Submission 132*, p. 4; Australian Vice-Chancellors' Committee, *Submission 189*, p. 13; Queensland Government, *Submission 206*, p. 10.

48 Queensland Government, *Submission 206*, p. 10; Ms Jane Drake-Brockman, *Transcript of Evidence*, 20 April 2004, p. 94.

49 Queensland Government, *Submission 206,* p. 10.

Recommendation 11

Notwithstanding the operation of the Professional Services Working Group, the Committee recommends that the Australian Government pursue through all other available diplomatic channels the issues of the mutual recognition of qualifications and the movement of business people between Australia and the United States.

Public and essential services

11.57 The Committee has heard and received a large amount of evidence which has raised concerns about the effect of the CBTS Chapter on the ability of Australian governments to regulate for services in the public interest.[50]

Domestic regulation

11.58 The Committee notes concerns in regard to the requirement under Article 10.7.2 that qualifications, licensing and standards are 'not more burdensome than necessary' and do not constitute an 'unnecessary barrier to trade'. It was presented to the Committee that these tests are ambiguous.[51]

11.59 Particularly worrisome to those individuals and organisations that expressed concern in this area is the use of these criteria in relation to the licensing requirements of health professionals and those supplying environmental services.[52]

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50 See for example: Ms Jacqueline Loney *Submission 86;* Ms Kerry Brandy, *Submission 168*; Mudgee District Environment Group, *Submission 58*; Annette Bonnici & Mike Hanratty, *Submission 35;* C.A. Roberts, *Submission 6*; Ms Katherine Martin, *Submission 40;* Mr Robert Downey, *Submission 1; Ms* Isabel Higgins, *Submission 46;* Mr Bill McClurg, *Submission 48*; Ms Pauline Stirzaker, *Submission 57;* Mr Jonathon Schultz, *Submission 51;* Catholics in Coalition for Justice and Peace, *Submission 59;* Mr John Morris, *Submission 73*; Mr Niko Leka, *Submission 89*; Mr Liam Cranley, *Submission 113;* Quaker Peace & Justice, *Submission 124;* Uniting Care (NSW / ACT), *Submission 169;* Conference Leaders of Religious Institutes NSW, *Submission 196;* Mr Tony Healy, *Submission 203.*

51 Dr Tracy Schrader, *Transcript of Evidence*, 5 May 2004, p. 30; Australian Council of Trade Unions, *Submission 130*, pp. 4-5; Mr W. Smith, *Transcript of Evidence*, 6 May 2004, p. 71; AFTINET, *Submission 68*, p. 13.

52 See Dr Tracy Schrader, *Transcript of Evidence*, 5 May 2004, p. 22; Mr Wayne Smith, *Transcript of Evidence*, 6 May 2004, p. 66; Australian Pensioners and Superannuants League, *Submission 30*, p. 6; StopMAI (WA) Coalition, *Submission 95*, pp. 7-8.

Annex II measures

11.60 Under Article 10.6, Australia has listed a number of sectors in Annex II as non-conforming measures, including social security, social insurance, social welfare, public education, public training, health and child care. These measures are reserved 'to the extent that they are established or maintained for a public purpose' (Annex II-4).

11.61 Australia has also reserved the right to 'adopt or maintain any measure with respect to primary education' (Annex II-10). Further, it may 'adopt or maintain any measure according preferences to any indigenous person or organisation for providing for the favourable treatment of any indigenous person or organisation in relation to the acquisition, establishment, or operation of any commercial or industrial undertaking in the services sector' (Annex II-1). The impact of the Agreement on Indigenous Australians was discussed at Chapter 3, and also arises in the Intellectual Property Chapter of this Report (Chapter 16).

11.62 The Committee notes concerns of the CPSU-State Public Services Federation that the requirement that services are reserved to the extent that they are 'established or maintained for a public purpose' is ambiguous and that it is difficult to envisage how this would be assessed in practice.[53] Friends of the Earth Melbourne stated that the ambiguity may result in the term 'public purpose' being construed narrowly.[54]

11.63 The Committee heard concerns that public health care may not be completely exempt. It was argued that privatisation of health services would, in the event of a dispute, support the conclusion that they are not 'established or maintained for a public purpose'.[55] A similar argument was raised for other services that are provided on a privatised or mixed public/private basis for the benefit of the public.[56]

11.64 Concerns were raised over the impact of the Agreement on Australia's tertiary education sector, in relation to increased access under the Agreement.[57] However, the Committee notes a submission

53 CPSU-State Public Services Federation *Submission 80*, p. 4.

54 Friends of the Earth Melbourne, *Submission 119*, p. 12.

55 Australasian Society for HIV Medicine, *Submission 75*, p. 4; Doctors Reform Society, *Submission 87*, pp. 4-5.

56 Victorian Government, *Submission 91*, pp. 3-4.

57 Australian Pensioners and Superannuants League, *Submission 30*, p.13; Mr Phillip Bradley, *Submission 84*; Ms Annie Nielsen, *Submission 96*; NSW Teachers Federation, *Submission 205*, p.1.

from the Australian Vice-Chancellors' Committee stating that 'on analysis, the services provisions of the Agreement provide for little substantive change in the operation of university education in both Australia and the United States.'[58]

Services supplied in the exercise of government authority

11.65 Services supplied in the exercise of government authority are exempt from the Agreement under Article 10.1.4(e). Services must be supplied 'neither on a commercial basis, nor in competition with one or more service suppliers'.

11.66 The Committee heard concerns that this definition of government services is ambiguous, considering that many services are operated on a mixed public/private basis and that government services are often in competition with private service-suppliers.[59]

Public utilities and transport

11.67 Of particular concern was the ability of governments to freely regulate for essential services under the Agreement. The Queensland Government submitted that public utilities are

> supplied in an environment where commercial suppliers exist, and to some extent compete, with government, these services do not meet the criteria of 'services supplied in the exercise of government authority'.[60]

11.68 The Committee notes the grave concern expressed to it regarding the regulation of water supply. It was stated that under the Agreement, governments may be restricted from regulating water supply for public policy purposes to limit who is able to provide services and how they may be provided.[61] Similar concerns were raised in relation to the provision of electricity[62] and transport services.[63]

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58 Australian Vice-Chancellors' Committee, *Submission 189*, p. 13.

59 Ms Thoedora Templeton, *Transcript of Evidence*, 5 May 2004, p. 35; National Civic Council, WA, *Submission 5*, pp. 3-4; AFTINET, *Submission 68*, pp. 12-13; CPSU-SPSF, *Submission 80*, p. 4; Victorian Government, *Submission 91*, pp. 3-4.

60 Queensland Government, *Submission 206*, p. 6.

61 Queensland Government, *Submission 206*, p. 7. See also: WA Government, *Submission 128*, p. 9; Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 35; Mr Gregory McLean, *Transcript of Evidence*, 6 May 2004, pp. 58-59; Australian Pensioners and Superannuants League, *Submission 30*, p. 13; Australian Services Union, *Submission 43*, p. 13; AFTINET, *Submission 68*, p. 14; Ms Dee Margetts MLC, *Submission 74*, pp. 6-7; The Grail Centre, *Submission 97*, p. 8; Ms Templeton, *Transcript of Evidence*, 5 May 2004, p. 35.

62 Queensland Government, *Submission 206*, p. 7; WA Government, *Submission 128*, p. 9; Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 35; AFTINET, *Submission 68*,

11.69 The Committee understands these concerns. However, it notes information available from DFAT which states that

> There is nothing in AUSFTA that would undermine the right of governments, at any level, to adopt measures for the management of water or for the sustainable management of any other natural resource. There is no obligation to privatise such services, nor anything in AUSFTA inhibiting proper regulation of water services for health or environmental reasons. AUSFTA would require any company with monopoly rights to supply a particular service, such as water, in a particular market to treat companies from the other country on a non-discriminatory basis, and that it should not abuse its monopoly position. That is fully consistent with the approach taken in Australia's current legislation, e.g. under the Trade Practices Act.[64]

and

> There is nothing in AUSFTA that would undermine the right of governments to adopt appropriate regulations that are in the public interest, for example, to achieve health, safety or environmental objectives. Nor does it require the privatisation of government services. Public services provided in the exercise of governmental authority will also be excluded from the scope of the services chapter.[65]

Local content

11.70 Chapter 10 of the Agreement also applies to television, radio and other broadcasting and audiovisual services, except to the extent that these are excluded as non-conforming measures under Annex I and Annex II of the Agreement.

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p. 14; The Grail Centre, *Submission 97*, p. 8; Ms Thoedora Templeton, *Transcript of Evidence*, 5 May 2004, p. 35.

63 Australian Rail, Tram and Bus Industry Union, *Submission 45*, pp. 1-2; AFTINET, *Submission 68*, p. 13; WA Government, *Submission 128*, p. 9.

64 DFAT, AUSFTA - Frequently Asked Questions, http://www.dfat.gov.au/trade/negotiations/us_fta/faqs.html, viewed on 15 June 2004.

65 DFAT, AUSFTA - Frequently Asked Questions, http://www.dfat.gov.au/trade/negotiations/us_fta/faqs.html, viewed on 15 June 2004.

11.71 Under Article 10.6, Articles 10.2 (National Treatment), 10.3 (Most-Favoured-Nation), 10.4 (Market Access) and 10.5 (Local Presence) do not apply to existing non-conforming measures set out by Australia in its Schedule to Annex I.[66] Further, they do not apply to measures adopted with respect to sectors, sub-sectors or activities set out in Australia's Schedule to Annex II.[67]

11.72 In Annex I-14, Australia has listed as a non-conforming measure the requirement for transmission quotas for local content on free-to-air television broadcasting services. Australia is able to maintain its existing requirement of a 55 per cent local content quota on programming and 80 per cent quota on advertising. These quotas apply to both analogue and digital free-to-air commercial TV, but not to multichanneling. Subquotas for particular program formats (such as drama or documentary) may be applied within the 55 per cent quota.[68]

11.73 Under Annex II, Australia has listed a number of reservations relating local content requirements for the broadcasting and audiovisual sectors. These allow the Australian Government to adopt or maintain certain measures in relation to digital multichanneling on free-to-air commercial television, subscription television, radio broadcasting, interactive audio and / or video services and future co-production arrangements with other countries.[69]

11.74 The provisions relating to local content have received a high level of public interest throughout the negotiation period and since conclusion of the Agreement.[70] Particular concerns will be detailed in the below sections.

Local content and its impact on culture

11.75 The Committee heard evidence on the importance of local content requirements for the Australian television and music industries and

66 AUSFTA, 10.6.1(a)(i).

67 AUSFTA, 10.6.2.

68 AUSFTA, Annex I-14. See also DFAT Backgrounder: '*The Australia-United States Free Trade Agreement: the outcome on local content requirements in the audiovisual sector*' http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html viewed on 9 June 2004.

69 AUSFTA, Annex II-6-9. See also DFAT Backgrounder: '*The Australia-United States Free Trade Agreement: the outcome on local content requirements in the audiovisual sector*' http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html viewed on 9 June 2004.

70 Mr Stephen Deady, *Committee Briefing*, 2 April 2004, p. 38.

for Australian culture, to the extent that 'successive federal, state and local governments in Australia have recognised that access to Australian arts, entertainment and audiovisual product is essential for the well being of this society.'[71]

11.76 Dr Patricia Ranald from Australian Fair Trade and Investment Network (AFTINET) reiterated to the Committee that local content rules are a 'cultural issue'.

> Australia does have a flourishing cultural industry, partly because we have Australian content rules and because we are a small market. Most countries have local content rules for cultural reasons – to ensure there is local content in the media. Local content does not just mean Australian content generally; it also ensures that Indigenous voices and voices from ethnic communities are heard – that the specific and varied cultures in Australia are reflected in the media.[72]

11.77 The Committee received numerous submissions from concerned individuals and groups detailing the importance of the presence of Australian 'stories and voices' on television and radio.[73] The Australian Pensioners and Superannuants League stated that

> Australia's cultural identity is preserved through Australian content rules, a vital support that ensures Australian stories are told on film and television in reinforcement of our own unique cultural identity. These rules also help to retain a local skills base that enables quality, culturally supportive films and television programs to be made here. The removal of

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71 Media, Entertainment and Arts Alliance, *Submission 67*, p. 6.

72 Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 37.

73 Ms Nizza Siano, *Submission 54;* Unfolding Futures Pty Ltd, *Submission 64;* Evelyn Rafferty, *Submission 25;* Ms Thea Ormerod, *Submission 29*, on behalf of 20 signatories; Mr Peter Youll , *Submission 32;* Ms Dee Margetts, Submission 74, p. 7 Ms Jacqueline Loney, *Submission 86;* AMWU, *Submission 125;* Mrs Catherine Dahl, *Submission 131*; Ms Kerry Brandy, *Submission 168 Katherine Martin*, Submission 40; Annette Bonnici & Mike Hanratty, Submission 35; Ms Nicole da Silva, *Submission 55;* Ms Pauline Stirzaker, *Submission 57; Mudgee District Environment Group*, Submission 58; Mr John Koch, *Submission 65;* Mr Oliver Baudert, *Submission 82;* Mr Niko Leka; *Submission 89;* Stop MAI (WA) Coalition, *Submission 95;* Mr Zenon 'Butch' Sawko, *Submission 104;* Ms Luci Temple, *Submission 107;* Ms Jane Seymour, *Submission 109;* Mr John Campbell, *Submission 110;* Ms Vera Raymer OAM, *Submission 118;* Friends of the Earth, Melbourne, *Submission 119;* Quaker Peace & Justice, *Submission 124;* Ms Ruth Williams, *Submission 139;* Mr Bruce Kirkham, *Submission 150;* APRA / AMCOS, *Submission 156;* Moonlight Cactus Music, *Submission 166;* Uniting Care (ACT / NSW), *Submission 169;* Ms Isabel Higgins, *Submission 46;* Catholics in Coalition for Justice and Peace, *Submission 59.*

> these rules would be an attack on Australia's culture and would also destroy a vital and growing industry.'[74]

11.78 Appearing before the Committee as a member of the Media, Entertainment and Arts Alliance (MEAA), Australian performer Ms Bridie Carter spoke emphatically of the importance of Australian film and television to the national psyche.

> Australians like to watch and hear about Australian stories and Australian points of view. We like it because we can all relate to it. It reflects our culture, our identity, our spirit and our sense of belonging. Movies like *Lantana* and *Shine* resonate with us because they have Australian faces telling Australian stories.[75]

11.79 The MEAA expressed to the Committee the unique position of the arts, entertainment and audiovisual sector in society and in relation to trade.

> Uniquely, the product, the manufactured goods and services created by and delivered by the cultural industries cannot be compared with the product or manufactured goods created by any other industry. Cultural products and services emanate from and are determined by the society from which they arise. Some of its manufactured goods are tangible and have a physical permanence – for instance, literature and paintings. Others are ephemeral and can only be experienced in the moment – for instance, plays, opera and dance – and, whilst they can be repeated and recreated, every performance will be a unique experience. And yet others can also be experienced in the moment – for instance, films and television programs – but can be experienced time and again.[76]

11.80 The Committee acknowledges the position of the audiovisual sector in Australian society as an instrument for the expression and reinforcement of the diversity of Australian culture. In agreement with those who appeared before or made submissions to the Committee on the importance of local content, the Committee does not wish to see any lowering of current standards.

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74 Australian Pensioners and Superannuants League, *Submission 30*, p. 12.

75 Ms Bridie Carter, *Transcript of Evidence*, 19 April 2004, pp. 66-67.

76 Media, Entertainment and Arts Alliance, *Submission 67*, p. 5.

The Australian audiovisual market

11.81 The Committee acknowledges the vibrancy of the Australian audiovisual sector, noting that in NSW alone

> the combined value of the film, television and video industries … is now worth $4 billion to the State's economy, a 54 per cent jump over the past five years. The industry accounts for 55 000 direct and indirect jobs, proving to be one of the fastest growing sources of employment ... In addition, the industry has injected $10 million into regional economies over the past five years and directly employed almost 3000 local people on local productions.[77]

11.82 However, the Committee heard evidence that the Australian film and television industry will be adversely affected by any lowering of local content standards. The Committee understands that this assertion is based upon the perception that, under the AUSFTA, the industry will be threatened by increased imports of US product at the expense of Australian audiovisual products.

11.83 Mr Simon Whipp, National Director of the MEAA, advised the Committee of the threat that increased export of American film and television would impose. He stated that American product is sold to Australian broadcasters at much cheaper rates than it costs to produce Australian programs, as the American producers have recovered their production costs in America and are exporting at a profit. Conversely, Australian producers recover only a fraction of the cost of production in Australia, and export (mainly to Europe rather than the US) in order to make up the balance.[78] This claim was supported by evidence that

> an American television drama program that costs US$1 million per episode to produce can recoup that investment within America and be sold to an Australian network for between US$20 000 and US$65 000 per hour. Conversely, an Australian program that might cost US$320 000 to produce per episode can expect a sale to an Australian broadcaster to cover only half the investment and is therefore reliant on international sales to recoup the full investment.[79]

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77 NSW Government, *Submission 66.*

78 Mr Simon Whipp, *Transcript of Evidence*, 19 April 2004, p. 67.

79 Media, Entertainment and Arts Alliance, *Submission 67*, p. 9.

11.84 The Committee heard that this disparity exists despite the fact that Australia produces film and television considerably more cheaply than the American industry does. The MEAA contend that the Australian market is 'too small to sustain a diverse range of program types and recoup production costs', giving the American market a 'competitive advantage that Australia will never overcome'.[80]

11.85 In its submission to the Committee, the Music Council of Australia addressed the link between Australian culture, the production of Australian films and government assistance.

> Our films are produced very economically, very efficiently. But given the realities of the world market, this does not, of itself, ensure that they are produced nor shown. Nor is it the primary reason for their production or exhibition. They affirm, reflect and develop national identity and character - a bipartisan government aspiration as revealed in the language of the charters of the ABC, the Australia Council, the Australian Broadcasting Authority / Broadcasting Services Act. We need them because in them, we see ourselves. But the market alone will not ensure production of Australian film. Government intervention is needed, as the government acknowledges.[81]

11.86 The Committee inquired as to the necessity of government intervention in the industry. Mr Scot Morris of the Australasian Performing Rights Association (APRA) and Australasian Mechanical Copyright Owners Society (AMCOS) stated that this was a result of the cost differences outlined above, rather than a product failure.

> We believe that there is a systemic market failure in terms of particular audiovisual product and broadcasting, comparing our market to the United States, and that is why to date there have been mechanisms to ensure that Australian content is available to Australian audiences. We believe that it has been necessary for governments to intervene to ensure that those products do have Australian content and that investment is made in Australian content, because market forces alone will not provide that result.[82]

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80 Media, Entertainment and Arts Alliance, *Submission 67*, p. 7.

81 Music Council of Australia, *Submission 31*.

82 Mr Scot Morris, *Transcript of Evidence*, 6 May 2004, p. 26.

11.87 It is claimed that in the absence of local content rules, there will be a decline in the production of Australian drama programs as they are unable to compete with those imported from the US. It was submitted to the Committee that this has occurred in New Zealand and Canada.[83]

Measures to ensure local content in the audiovisual sector

11.88 Despite claims by industry groups, community organisations and concerned individuals, DFAT has advised the Committee that the AUSFTA will not adversely affect quotas for local content in Australian broadcasting services. According to the NIA, Australia 'retains the power to regulate for Australian content, not only in existing forms of media, but also, where necessary, in new media.'[84] Similarly, Mr Deady informed the Committee that

> we have negotiated a very good outcome for the Australian industry. The current local content requirements are fully preserved under the agreement and we have also ensured a large amount of flexibility for future governments to make sure that there is adequate Australian content in all forms of potential new media.[85]

11.89 DFAT provided the Committee with an overview of the provisions of the AUSFTA relating to the audiovisual sector

> we have preserved the local content requirements on free-to-air television—the 80 per cent advertising and 55 per cent local content on the commercial stations. We have introduced the capacity to extend those local content requirements as we move into a new era of perhaps multichannelling on free-to-air television. We have some existing constraints on pay television. We have flexibility for future governments to extend those requirements on pay television quite substantially in the future. In the area of the so-called new media, the things that we perhaps do not know about as fully, we have a capacity here for the government of Australia to make a finding. If it is a determination that there is inadequate Australian content in some of this new media in

83 Media, Entertainment and Arts Alliance, *Submission 67*, p. 9.

84 NIA, para. 8.

85 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 74.

> the future, then a future government can introduce measures to ensure there is adequate local content on that technology.[86]

11.90 The Australian Coalition for Cultural Diversity (ACCD), however, disputes DFAT's analysis. The Coalition argued before the Committee that regulation under the Agreement represents a 'practical standstill' for free-to-air and pay television. Further, it was stated that cinema, video stores and other media currently are, under the Agreement, all exempt from future government regulation.[87]

11.91 The Committee questioned DFAT representatives about claims in the US report of the Advisory Committee for Trade Policy and Negotiations that the US has gained increased market access for US film and television programs. Dr Milton Churche responded that

> Essentially what they are talking about here is the annex 2 reservation. The whole point here is what it gives to the US: some certainty about the regulatory environment which US service providers are going to face in the Australian market in the future … what this does, essentially, through these bindings, is to continue to allow Australian governments into the future not only to maintain existing local content requirements but to respond to changes in the market and changes in technology. But there are certain limits. We do not have a totally free hand. We cannot go to a situation in which we ban all the US content. Those sorts of commitments do give some certainty of service providers in the United States.[88]

11.92 The Committee received submissions from the Governments of the ACT, South Australia and Western Australia expressing concern over any potential restriction on future regulation of local content.[89]

Annex I measures

Free to air television broadcasting

11.93 Under Annex I of the Agreement, Australia has maintained its transmission quota on free to air commercial television, for both analogue and digital broadcasting. This has two aspects. Firstly, it includes a requirement that up to 55 per cent of content transmitted

86 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, pp. 74-75.

87 Mr Simon Whipp, *Transcript of Evidence*, 19 April 2004, p. 60.

88 Dr Milton Churche, *Committee Briefing*, 2 April 2004, p. 44.

89 ACT Government, *Submission 180*, p.4; South Australian Government, *Submission 198*, p. 5; Western Australian Government, *Submission 128*.

annually between 6.00 a.m. and midnight consist of Australian content. Subquotas for particular formats, such as drama or documentary, may be applied within the 55 per cent quota.[90] Secondly, it involves a maximum 80 per cent local content quota for advertising on free to air commercial television.[91] These quotas are consistent with the current local content requirements in Australia.

Ratchet mechanism

11.94 The measures included in Annex I are subject to a ratchet mechanism. Mr Deady advised the Committee that the mechanism

> covers what happens if Australia or the United States liberalise any one of these reservations. The clearest example would be: if a future Australian government reduced the local content requirement on analog television to 45 per cent, then under the commitments in this agreement a future government could not increase it back to 55 per cent. The 45 per cent would then become the binding commitment that future Australian governments would have to adhere to. That would also apply to the move to digital television—that is an annex 1 reservation, which is effectively a standstill reservation, so it is a binding at a current level.[92]

11.95 The Committee notes evidence from DFAT that the mechanism applies only to single channel free to air, and will only come into operation should a government choose to actually lower content requirements.

> The ratchet mechanism applies only while we continue to have single channel, free-to-air TV. There is nothing in the agreement which in any way requires us to actually change the 55 per cent programming quota or the 80 per cent advertising quota. That would be purely up to any future Australian government. If a future Australian government made that decision and actually cut it, the ratchet mechanism would come in.'[93]

11.96 The Committee received evidence criticising the ratchet provisions

90 AUSFTA, Annex I-14(a).

91 AUSFTA, Annex I-14(b).

92 Mr Stephen Deady, *Committee Briefing*, 2 April 2004, p. 39.

93 Dr Milton Churche, *Committee Briefing*, 2 April 2004, p. 43.

> This Agreement would make it impossible for any future government to make any change to local content rules, except downwards. Furthermore an action of that kind would in turn bind governments thereafter to local content quotas no higher than that level.[94]

11.97 However, DFAT advised the Committee that the ratchet mechanism is

> quite a strong part of the agreement. You do not have anything similar in the WTO. It is one of the strong parts in terms of locking in liberalisation over time between us as bilateral partners.[95]

Advertising

11.98 The quota for television commercials under Annex I is bound at a ceiling of 80 per cent. This operates consistent with current practice, so that 80 per cent of commercials must have Australian content, rather than previous policy which dictated that all commercials must have 80 per cent local content. The Committee notes that, under the Agreement, it would not be possible to revert back to the previous quota requirements.[96]

Subquotas

11.99 DFAT has stated that subquotas for various programming formats may be imposed within the 55 per cent local content requirement.[97] The Committee received evidence from the Australian Broadcasting Authority (ABA) noting the benefit of subquotas within local content requirements.

> Current Australian content regulation has requirements for relatively high cost adult and children's drama, and for documentary programs. While all program categories contribute to the mix of Australian programs and are important to audiences, the sub-quota programs are particularly important. They provide a minimum safety net for Australian 'voices' in genres particularly vulnerable to

94 Friends of the ABC NSW, *Submission 60,* p. 3.

95 Dr Milton Churche, *Committee Briefing*, 2 April 2004, p. 43.

96 Dr Milton Churche, *Committee Briefing*, 2 April 2004, p. 40.

97 DFAT Backgrounder: '*The Australia-United States Free Trade Agreement: the outcome on local content requirements in the audiovisual sector*' http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html viewed on 9 June 2004.

> replacement by less expensive genres or imports (especially adult drama, children's programs and documentaries), notwithstanding demonstrated audience appeal.[98]

11.100 The Committee has heard concerns that subquota provisions will be caught by the ratchet provisions and will thus be restricted to their present level. MEAA submitted that

> Department of Foreign Affairs (DFAT) trade agreement negotiators have advised that Australia will be free to introduce or amend, by way of increasing if considered appropriate, the subquotas. However, this interpretation sits uncomfortably with a reading of Clause 10.6.1. which allows for nonconforming measures as set out in Annex I to be retained but such retained non-conforming measures can only be amended if the amendment 'does not decrease the conformity of the measure as it existed immediately before the amendment'. This would seem to imply that additional subquotas could not be introduced, for instance in respect of music, nor could existing subquotas – adult drama, children's programs and documentaries – be increased, even within the 55 per cent overall transmission quota, rather the existing subquotas could only be amended by reducing the effect of the measure and, if decreased, the ratchet provisions will prevent the requirement from being increased in the future.[99]

11.101 However, the ABA informed the Committee that it had received advice that

> sub-quotas are not caught within the 'ratcheting' rule and can be altered and possibly increased provided that overall the 55 per cent cap is adhered to. The ABA has also been advised that the wording of the reservation, 'e.g. drama and documentary,' means the way is open to introduce new sub-quotas, provided the 55 per cent cap is not exceeded. The ABA strongly supports the flexibility that has been maintained in regard to the subquotas in the wording of this reservation.'[100]

98 Australian Broadcasting Authority, *Submission 135*, p. 3.

99 Media, Entertainment and Arts Alliance, *Submission 67*, p. 12.

100 Australian Broadcasting Authority, *Submission 135*, p. 4.

Application of Annex I to multichannelling on free-to-air

11.102 The Committee notes advice from DFAT that Annex I reservations apply to both digital and analog broadcasting. However, if Australia were to move to a multichannel environment, Annex I and the ratchet mechanism would not apply to multichannel free to air television.[101]

Recommendation 12

The Committee recommends that the Government take immediate action to incorporate the current quota levels for local content under the *Broadcasting Services Act 1992* which are subject to the 'ratchet' provisions of the Treaty as schedules under the Act so that they can only be changed by a deliberative decision of the Parliament.

Annex II measures

11.103 Under Annex II Australia has reserved the right to maintain and introduce measures relating to the audiovisual sector. The Committee was informed by DFAT that the Annex II reservations give Australia flexibility 'not only to maintain existing measures but to introduce new measures'.[102] Annex II reservations are not subject to a ratchet mechanism.[103]

Multichanneling

11.104 Under Annex II-6(a) Australia reserves the right to adopt local content requirements on multichannelled free-to-air commercial television broadcasting services. The provisions allow for a maximum quota of 55 per cent of programming. The quota can be imposed on no more than 2 channels or 20 per cent of the total number of channels offered by a service provider, whichever is greater. It cannot be imposed on more than 3 channels of any individual broadcaster. Subquotas may be applied within the 55 per cent quota 'in a manner consistent with existing standards'.[104] An advertising quota of up to 80 per cent on

101 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, p. 81.

102 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, p. 81.

103 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, p. 81.

104 AUSFTA, Annex II-6(a).

individual channels of a service provider may be imposed on no more than 3 channels of that provider.[105]

11.105 In response to questioning from the Committee, Dr Churche explained the operation of the multichannelling provisions

> If we go to multichannelling, irrespective of the number of channels each service provider provides, we can impose local content requirements on at least two of those channels … For example, say we have Channel 7, Channel 9 and Channel 10 as they are at the moment. They all become digital multichannels and, if each of them has two channels, we could impose local content requirements on each of those two channels—in other words, six channels in total ... There are two parts to what we have done. We have said, 'You can have at least two channels, or you can impose the local content requirement on 20 per cent of the total number of channels.' That really only kicks in when you reach 10 channels for each service provider. If Channel 7, for example, had 10 channels, two channels equals 20 per cent. If they go beyond that and they get to 15 channels, you can go to three channels.[106]

11.106 Several parties informed the Committee of their concerns that the multichanneling provisions were limited. Dr Ranald stated that

> while multichannelling will mean a vast increase in the amount of material available to Australians – and that is positive – the Australian content rule will only apply on up to three channels. So the proportion of Australian content generally will be limited. Our concern is that that will mean an overall reduction in Australian content and the opportunity to hear Australian voices.[107]

11.107 Similarly, the ABA stated that

> The capacity to ensure local content on possible free-to-air multi-channels, provided in Annex II is important in light of the anticipated continuing strength of commercial television in digital-era media. The ABA notes that the reservation limits regulatory options that might be considered for these services, constraining the number of multichannels that might

105 AUSFTA, Annex II-6(a).

106 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, pp. 83-84.

107 Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, p. 37.

> be regulated, and restricting the approach to the existing transmission quota model applied to single channels;[108]

and

> In practice it is likely that only the main service and one other could be subject to Australian content requirements, as each network's 7 MHz channel potentially provides for five or so multi-channels. The number of multi-channels would have to be fifteen or more, to allow local content regulations to be imposed on three channels (or 20 per cent of channels)… Depending on the number of multi-channels and the nature of the programming on these channels, the ABA accepts that the content of some of the digital multi-channels could be predominantly foreign.'[109]

11.108 MEAA argues that no matter what the effect of multichannelling would be, it is more likely to be introduced on pay television, rather than on free-to-air, because of the reliance of free to air television on advertising revenue. The MEAA stated that advertising industry was likely to become more focused on pay TV, rather than free to air.[110]

11.109 Mr Michael Baume AO appeared before the Committee, refuting claims that free to air television would suffer in any way due to an increase in subscription television. Mr Baume argued that 'although Pay TV has been in Australia since 1992 and the Internet since 1997, the resultant fragmentation of audience has not caused advertising revenues for [free-to-air] networks to fall.[111]

Subscription television

11.110 Under Annex II, Australia is able to impose a local content quota on subscription, or pay, television services. The quota is to take the form of the current requirement of 10 per cent of program expenditure. Quotas can be imposed on service providers for arts, children's, documentary, drama and educational programming.[112] However, no one channel will be subject to an expenditure quota for more than one of these categories.[113]

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108 Australian Broadcasting Authority, *Submission 135,* p. 4.

109 Australian Broadcasting Authority, *Submission 135,* p. 5.

110 Media, Entertainment and Arts Alliance, *Exhibit 18,* p. 10.

111 Mr Michael Baume AO, *Transcript of Evidence*, 6 May 2004, p. 49.

112 AUSFTA, Annex II-7(d).

113 AUSFTA, Annex II-7(d), footnote 2.

11.111 Additionally, the expenditure quota may be increased up to a maximum of 20 per cent if an Australian government was to find that the 10 per cent quota was insufficient to meet the government's stated goal for such expenditure. The government must make such a finding through a transparent process that includes consultations with any affected parties, including the US. The reservation requires that any increase in expenditure quota imposed by the government be 'non-discriminatory and no more burdensome than necessary.'[114]

11.112 Mr Deady informed the Committee that the provisions allowed future governments flexibility to impose broader requirements than those currently in place.

> We have a 10 per cent expenditure requirement now on drama channels on pay TV, as you know. We have the capacity under the agreement to double that—so 20 per cent on drama channels—and we also now have a capacity to establish completely new expenditure quotas; that is, up to 10 per cent of programming expenditure on four additional services: children's television, documentary, educational and the arts. So that is a significant increase—the current arrangements allow for just the 10—and that is building in flexibility for future Australian governments to ensure Australian content on those pay TV platforms.[115]

11.113 In response to a question from the Committee, Dr Churche confirmed that the 10 per cent expenditure quota is an aggregate amount

> The point about our pay television obligations is that we can place expenditure requirements on each service provider. For example, if you had two pay TV providers and each of them had, say, 10 drama channels, then the expenditure requirement could be imposed on each of the drama channels on each of the pay TV providers. I think that is very important to emphasise. I think that is true at the moment under our existing pay TV, there are about 14 drama channels, so we can impose that expenditure requirement on all 14 drama channels. In the future, as pay TV expands in the Australian market, as one would expect, and as we see more channels being provided, and as we know that is happening with digital plans, we would expect that this 10 per cent—and

114 AUSFTA, Annex II-7(d).

115 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 77.

> certainly if we move to 20 per cent—would be quite a significant amount of money.[116]

11.114 A major concern presented to the Committee regarding subscription television was over the actual value of expenditure quotas and the fact that the Agreement restricts the government from introducing any other form of regulation for local content in subscription TV.

11.115 Witnesses sought to impress upon the Committee the inadequacy of expenditure as a measure of content. Ms Megan Elliot from the Australian Writers' Guild commented that a 10 per cent expenditure quota may not amount to much in situations where American content is being purchased for very small amounts.[117]

11.116 The Committee notes with interest that

> Australian Film Commission research demonstrates that a 10 per cent expenditure requirement delivers only three percent of content. If the AUSFTA enters into force, the most that future governments will be able to mandate is an increase to 20 per cent which is likely to deliver six to seven percent content.[118]

11.117 Of particular concern to members of the audiovisual industry is the effect of growth in the pay TV market on Australian culture, in light of the Annex II reservation.

> Free-to-air television now has the lion's share of the audience in terms of the screens that people are watching, but we know that in 20 years time that will not be the case. Ten years ago free-to-air television had 100 per cent of the audience. It now has an 80 per cent share, and it will not have that in 10 years time. Free-to-air television is relatively well regulated for local content. Pay television will never be well regulated for local content. The rules which are now in place deliver 3.2 per cent Australian programs. As a result of what the government has agreed, we know that 3.2 per cent is the most that we can expect for Australian children's programs, arts and entertainment, educational programs and documentaries. On pay television, that may be a little bit more, subject to consultation with the US. So on pay television we certainly

116 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, p. 79.

117 Ms Megan Elliot, *Transcript of Evidence*, 19 April 2004, p. 81.

118 Media, Entertainment and Arts Alliance, *Submission 67*, p. 13.

> know that levels of local content in the long term will be significantly less.[119]

11.118 The Committee took evidence from the Western Australian Government on the potential consequence of this.

> A greater take-up of Pay TV, with low levels of Australian content, also has important implications for Australia's ability to maintain its cultural identity. Australia needs to retain its right to ensure local voices are heard and local stories are told on its most popular broadcasting mediums. The AUSFTA should take into account the potential growth of subscription television in Australia.[120]

11.119 The Committee received evidence that, even with the possibility of increasing the expenditure quota on pay television, the reservation will not allow governments to regulate sufficiently for the protection of Australian culture, particularly with regard to expected growth in the subscription television market.

11.120 The Australia Screen Directors' Association and Australian Writers Guild stated that

> the caps on expenditures on Australian adult drama (20 per cent) and children's, documentary, arts and education channels (10 per cent), will be the lowest in the developed world … and take no account of the future potential of the digital Pay TV platform in this country, particularly as the television market fragments with digital take-up.[121]

11.121 The Western Australian Government submitted to the Committee that

> the low caps on Pay TV expenditure have implications for the viability of Australia's film and television sector into the future. The AUSFTA restricts the ability for Australia, and Western Australia, to take up opportunities that might emerge from the growth of the Pay TV industry to a point where it could afford higher levels of expenditure on Australian product. A larger market would assist in developing the film and television industry, which would enable it to be more competitive in the global market.[122]

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119 Mr Whipp, *Transcript of Evidence*, 19 April 2004, p. 74.

120 Western Australian Government, *Submission 128*, p. 8.

121 Australian Screen Directors' Association and the Australian Writers' Guild, *Submission 164*, p. 11.

122 Western Australian Government, *Submission 128*, p. 8.

11.122 The Committee notes evidence from the Screen Director's Association and Writers Guild that

> the FTA caps only match the industry's recommendations to the ABA's Review of Australian Content on Subscription Television (February 2003), which we considered modest to reflect the still emerging economics of the Pay TV industry in this country.[123]

11.123 The Committee understands that the industry is concerned, not with the current use of expenditure quotas, but with the restriction placed on the Government under the AUSFTA, which prevents future reassessment of the use of expenditure quotas as a form of regulation. The Committee notes concerns that

> this approach locks in the 'expenditure' as the only way to intervene in subscription television. If the industry has learned anything from the lessons of history in broadcasting, it has been that it is important to be able to alter policy settings in order to respond to changes in technology, commerce and viewing patterns.[124]

11.124 The Committee heard similar concerns from the ABA.

> While expenditure requirements may be the most appropriate form of regulation at the sector's current stage of development, this could change with the shift to digital transmission anticipated to increase take up of subscription television - increasing ratings and advertising revenue in the future years.[125]

11.125 DFAT advised the Committee that an expenditure quota of 10 per cent presented more certainty that would have been possible had it been attempted to negotiate content quota.

> In terms of this general point that the industry has raised about transmission time, it is important to note that it is very difficult to compare what we do on free-to-air TV, where we have a single channel and therefore a known quantum of the hours which are being transmitted, with pay TV, where no-one has any idea of what that quantum will be. At the

123 Australian Screen Directors' Association and the Australian Writers' Guild, *Submission 164*, p. 11.

124 Australian Screen Directors' Association and Australian Writers Guild, *Submission 164*, p. 11.

125 Australian Broadcasting Authority, *Submission 135*, p. 5.

> moment we have a certain number of channels, but we could find ourselves in a situation in the future where there might be 500 channels or 1,000 channels. We have no idea of the amount of hours there will be at the time. If we had gone into this negotiation saying to the Americans, 'We want to put a percentage number there'—say, 20 per cent of total transmission hours—when we have no idea of what that will be in 20 years time, I think we would have been very much in a situation where the Americans would have said, 'You can have no more than five per cent,' working on the assumption that in 20 years time the amount of transmission hours is going to be infinitesimal … Of course, Australia has adopted this approach on pay TV because it is a very different medium. We certainly do not see that as the most effective tool—to try to use transmission hours—first, because the amount of hours is so much greater; and, second, because there are a lot of reruns and things like that.[126]

11.126 Dr Churche also noted that an expenditure quota generated new money for the industry, which in turn would ensure that new productions were shown on television

> The whole point about the expansion requirement is that it is an expenditure requirement in relation to new programming. So it is new money going into the making of new production. It is not about saying 10 per cent has to be Australian produced at some time in the future. It is no good showing *Skippy* or whatever to fill in. It has to be new money generated into the industry. That is why it is very important. That is why we think what we have here is a very good outcome.[127]

11.127 The Committee notes that, under the Agreement, there is no provision for local content in advertising on subscription television.[128]

Commercial radio broadcasting

11.128 Under Annex II, Australia reserves the right to impose transmission quotas for local content on commercial radio services. The quota may

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126 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, p. 79.

127 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, pp. 79-80.

128 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Estimates Hearings, Department of Communications, Information Technology and the Arts, *Answer to Questions on Notice*, Question 84, February 2004.

be up to a maximum of 25 per cent of the programming on individual stations of a service provider.[129]

11.129 The entertainment industry has expressed some concern at the 'capping' of music quotas at 25 per cent. Appearing before the Committee, Dr Richard Letts of the Music Council of Australia stated that the 25 per cent quota is lower than requirements for local music on radio in countries such as France and Canada. In the Music Council's submission to the Committee, it commented that in addition to having higher quotas, France and Canada also have 'other regulations that might possibly have been emulated to the benefit of the Australian music sector and the national accounts'.[130]

11.130 The ABA submitted to the Committee that

> levels of Australian music are currently set by means of the Commercial Radio Codes of Practice, and vary depending on station format. Annex II in AUSFTA caps any transmission quotas for local content / Australian music at 25 per cent, which equates with the highest format level currently specified in the Code. Maintaining the right to regulate for Australian music, beyond codes of practice, provides flexibility.[131]

11.131 However, the Music Council argued that if quotas were to be lowered or terminated, then both broadcasters and record companies would withdraw support for Australian music, which would evidently affect the vitality of the industry. An increase of quotas would, in turn, strengthen the industry.[132]

11.132 The Committee also heard that that the Annex II quota applies only to commercial radio, and not to the community radio sector. Dr Letts stated that the exclusion of community radio from Annex II may prevent government from regulating for Australian content on community radio which, is often responsible for exposing a wider range of musical styles than are played on commercial radio.[133]

Interactive audio and/or video services

129 AUSFTA, Annex II-7(e).

130 Music Council of Australia, *Submission 31*, para. 19.

131 Australian Broadcasting Authority, *Submission 135*, pp. 5-6.

132 Music Council of Australia, *Submission 31*, para. 23.

133 Dr Richard Letts, *Transcript of Evidence*, 19 April 2004, p. 65.

11.133 The Australian Government has reserved the right to take measures to ensure that Australian content on interactive audio and / or video services is 'not unreasonably denied' to Australian consumers. A government may take such measures only where it finds that Australian audiovisual content is 'not readily available' to Australian consumers.

11.134 Measures must be 'implemented through a transparent process permitting participation by affected parties.' Further, they must be based upon objective criteria and be the minimum necessary. Measures must be 'no more trade restrictive than necessary' and must 'not be unreasonably burdensome'. They can be applied only to a service that is provided by a company which 'carries on a business in Australia in relation to the supply of that service'.[134]

11.135 Mr Deady advised the Committee that these provisions ensured

> a large amount of flexibility for future governments to make sure that there is adequate Australian content in all forms of potential new media.[135]

Definition

11.136 Evidence taken by the Committee on the interactive audio and / or video services provision centred around two major issues. Firstly, it was contended that, as a definition intended to capture new forms of media, 'interactive audio and / or video' is ambiguous. Secondly, concern was expressed over the process required in order for the Government to introduce new regulations in relation to 'interactive audio and / or video services'.

11.137 Much of the evidence heard by the Committee on the issue of new media related to the use of the terminology 'interactive audio and / or video'. The Committee notes that there is much concern over the ambiguity of the provision. Ms Elliot of the Australian Writers' Guild expressed to the Committee concern that

> the definitions within the agreement only speak about new media in terms of interactive audio and / or video. We do not know what that means; it does not provide a meaning for us.[136]

134 AUSFTA, Annex II-7(f).

135 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 74.

136 Ms Megan Elliot, *Transcript of Evidence*, 19 April 2004, p. 72.

11.138 Mr Morris of APRA / AMCOS commented in relation to the terminology of 'interactive audio and / or video services' that

> there may be some problems with clarity in terms of what services will come within that definition that may be subject to the existing intervention and the digital products that will be liberalised under the agreement.[137]

11.139 MEAA questioned specifically the use of the term 'video services', claiming that

> the word 'video' could be considered to be technologically specific. The lack of certainty and the doubt about the extent to which the reservation for new media will encompass all media now known or yet to be invented is likely to have unintended consequences in years to come. As such, the Alliance considers that the drafting of the reservation is seriously flawed. It also appears the negotiators are relying on the use of the word 'interactive' and consider that this terminology would capture such services as VOD [video on demand] and pay-per-view (PPV) because the services are delivered to a delivery platform with interactive capability.[138]

11.140 Appearing before the Committee, Ms Anna-Louise Van Rooyen Downey from the Australian Interactive Media Industry Association (AIMIA) stated that

> interactive audio and / or video could be just about anything. It could be explained away as something which is not what we refer to as the powerful future of digital content industries, which might be a broadband movie which is paid for through an e-commerce channel. To me that is not an interactive audio or video; it is an e-commerce digital product. I would like to see much clearer definition of what actually constitutes interactive audio and / or video.[139]

11.141 The Committee heard concerns relating to the possible capture of new digital media by provisions relating to e-commerce.

> Interactive and new media are not defined in the text of the agreement. What is defined in the e-commerce chapter is 'digital products', and it is clear that the meaning of digital

137 Mr Scot Morris, *Transcript of Evidence*, 6 May 2004, p. 21.

138 Media, Entertainment and Arts Alliance, *Submission 67*, p. 15.

139 Ms Anna-Louise Van Rooyen Downey, *Transcript of Evidence*, 19 April 2004, p. 6.

> products includes all forms of digitised media. So what we are seeing is that anything that does not meet this hazy definition of interactive media would be caught by the e-commerce chapter. Already, we can see that e-cinema and perhaps those aspects of datacasting which are not interactive are caught by the e-commerce chapter. We are fearful because, as we have said, we do not know what new media are coming and, because it is not defined in the reservation, we fear that it will be captured by the e-commerce chapter and subject to liberalisation.'[140]

11.142 Mr Jock Given submitted to the Committee that

> the definition of the services to which measures may be applied … appears to cover most forms of internet, mobile and video-on-demand services but not digitally-delivered 'e-cinema'. Even if the delivery of cinema services to customers is still done in the future by a local service provider, there may be no interactivity involved. 'Datacasting', as currently defined under the Broadcasting Services Act, would be covered to the extent that it was interactive, but not to the extent that it wasn't. This is potentially significant given the broadcast-style content which is able to be transmitted under a datacasting licence.[141]

11.143 A submission from the Australian Screen Director's Association and the Australian Writers' Guild stated that

> A problem is that these services are not defined in the agreement, but the key seems to be that the service has to be interactive in some way. Exactly how interactive is not certain and we are concerned that the absence of a definition could provide the ground for challenges to future government action. Already it can be seen that at least two of the new media services identified in the AFC's report would not meet this definition. These are electronic cinema, whereby feature films are delivered directly **to** theatres by electronic means and then also projected electronically, and datacasting services licensed by the ABA. It may be that there are other

140 Mr Nic Herd, *Transcript of Evidence*, 19 April 2004, p. 73.

141 Mr Jock Given, *Submission 147*, p. 4.

> technologies or delivery systems that are similarly questionable.[142]

11.144 Confusion over which technology will fall within the provision has led to concerns that the Australian Government will be precluded from regulating local content on emerging media forms which are deemed not to fall within the scope of the provision. The Government of NSW expressed concern that 'the proposed Agreement does not provide for similar local content regulation in relation to new and emerging media.'[143]

11.145 The Australia Council for the Arts stated that

> many impacts on the cultural sector arising from the AUSFTA will not become apparent until as-yet-unconceived technologies come into play. By 2010, virtually all entertainment and media is expected to be in digital formats, easily fed via satellite to cinemas and homes from sources outside Australia. As a result, many of the existing broadcasting rules governing local content will become irrelevant, and new forces will come into play.[144]

11.146 In response to a question from the Committee regarding the meaning of the provision, Dr Churche stated

> we have used the term 'interactive audio and/or video services' deliberately to cater for the fact that we do not know what those technologies of the future might be. We have used the term 'interactive' because we are trying to cover media platforms which are not covered by other things such as free-to-air television or subscription TV ... We have a problem here; we need a way to cater for uncertainty about technological change. That is one of the things we have tried to address there. There is no fixed definition there … Interactive audio and/or video services is, in our view, quite a broad category … The danger is that, if we try to define what that is, do we just do it on the basis of our current knowledge about what technologies are available now or do we look into our crystal ball to see what we think is going to appear in the next 10 or 20 years? We think we have a very

142 Australian Screen Directors' Association and the Australian Writers' Guild, *Submission 164*, p. 13.

143 NSW Government, *Submission 66,* p. 1.

144 Australia Council for the Arts, *Submission 157*, p. 2.

broad catch-all category which can bring in a whole range of new media platforms.[145]

Recommendation 13

The Committee acknowledges the need for flexibility in the AUSFTA given the new and emerging technologies at the intersection of e-commerce, telecommunications and multimedia. The Committee recommends that the Australian Government be responsive to the need to ensure that future domestic legislation is consistent with the AUSFTA and the requirements of innovators and consumers and in particular that future regulation of such technologies will have to be more carefully targeted as a consequence.

Recommendation 14

The Committee, noting evidence that terminology regarding audio and/or video services is ambiguous, recommends that future reviews of the AUSFTA need to ensure that terminology can encompass emerging technology.

Regulation for new media

11.147 The Committee received evidence regarding the process by which an Australian government could implement new measures for interactive audio and/or video services. Concerns centred around the possibility of consultation with the US prior to implementing new measures, and tests to determine whether Australian content was 'readily available' or 'unreasonably denied', and that measures were not 'unreasonably burdensome' and were the 'minimum necessary'. Questions were also raised regarding the implications of a restriction in application only to service providers carrying on business in Australia.

11.148 Annex 2-7(f) provides that Australia can only act to ensure Australian content on these services is 'not unreasonably denied' to Australians and can only do so after making a finding 'that Australian

145 Dr Milton Churche, *Committee Briefing*, 2 April 2004, p. 43.

audiovisual content or genres thereof is not readily available to Australian consumers'. There are thus two tests to be met before the Australian government can act. It is not enough that there be a finding that Australian content on any of these services is not available to Australians, but it must also be established that the absence of such content is because of some unreasonable denial.'[146]

11.149 Friends of the ABC NSW submitted to the Committee that

> This is a particularly negatively-framed provision of the Agreement: it aims to ensure that Australian content is 'not unreasonably denied' to Australian consumers of these services. To demonstrate this the Government has to find that the Australian content is not readily available, and must do so in a way which according to the Agreement is 'no more trade restrictive than necessary'.
>
> This is a particularly timid provision when the future of broadcasting is such an unknown quantity. The only certainty is that it will be a quite different broadcasting environment to today's and that it is a near future, not a distant prospect.[147]

11.150 The Queensland Government questioned how onerous a test would be applied in order to determine that Australian consumers were being 'unreasonably denied' access to Australian content.[148]

11.151 Mr Jock Given submitted to the Committee that

> 'measures to ensure that ... Australian audiovisual content or genres ... is *not unreasonably denied* to Australian audiences'—maybe a very tough test to satisfy. One might argue, for example, that Australian material is already 'not unreasonably denied' to television audiences in the US, despite its very low visibility. In the future, Australian material might be technically available to Australian audiences online via servers, but the search engines and electronic program guides generally used to make viewing / using choices might not readily lead the user to it.[149]

146 Australian Screen Directors' Association and Australian Writers' Guild, *Submission 164*, p. 13.

147 Friends of the ABC, NSW, *Submission 60*, p. 3.

148 Government of Queensland, *Submission 206*, p. 11.

149 Mr Jock Given, *Submission 147*, p. 4.

11.152 Examining the possible readings of this provision when taken in the context of other Annex II measures, Mr Harris of the Australian Screen Directors' Association stated

> the benchmarks have again been set low. The use of terms like 'unreasonably denied' when you have set the benchmarks for pay TV at levels of 10 per cent and 20 per cent means that if you actually did come to the determination that you wanted levels higher than that it would be very difficult for anyone to argue for it on any of these new media services.[150]

11.153 The Committee notes particular concerns from both the industry and the community that the implementation of new measures would require consultation with affected parties, including the US.

11.154 The Music Council of Australia submitted to the Committee that the provision

> raises the question of what happens if, having consulted, the Australian government wishes to proceed with regulations with which the US has stated it is in disagreement. Can the US then retaliate (as it has been seen to do elsewhere, and disproportionately)? Is the knowledge that the US is capable of retaliating likely to inhibit the Australian government from placing Australian cultural interests first? *Or* are they to be constrained *a priori* by the US's view of its own trade priorities?[151]

11.155 With respect to these concerns, the Committee notes evidence from the Queensland Government that

> the Commonwealth Government has advised that this reservation does not require the government to get the approval of any party to implement measures. It merely places a procedural obligation to consult with affected parties. This means that the US would not be able to veto any future measures that the Commonwealth Government may choose to implement on interactive, audio and/or video services.[152]

11.156 MEAA submitted that

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150 Mr Richard Harris, *Transcript of Evidence*, 19 April 2004, p. 73.

151 Music Council of Australia, *Submission 31*, para. 28.

152 Queensland Government, *Submission 206*, p. 11.

> Of concern is that any future regulatory requirement that might be introduced must 'be the minimum necessary, be no more trade restrictive than necessary, not be unreasonably burdensome'. But of greater concern is the fact that regulation can only be introduced in respect of 'a service provided by a company that carries on a business in Australia in relation to the supply of that service'. As we enter the global information era, media distribution is being revolutionised. Increasingly, companies that do not carry on a business in Australia will be able to deliver services in Australia. However, it will only be those that carry on business in Australia that can be regulated. Consequently, any regulation is likely to be more burdensome on those that have a business in Australia than for those that do not. It will hardly be creating a level playing field for Australian businesses to compete with those from overseas.[153]

Subsidies, grants and tax concessions for the film industry

11.157 Under Article 10.1.4(d), the provisions of Chapter 10 do not apply to subsidies or grants provided by a Party.[154] Annex II provides that the Australian Government is able to continue to grant taxation concessions for investment in Australian cultural activity, even where eligibility for the concession is subject to local content or production requirements.[155]

11.158 Members of the Australian audiovisual industry presented to the Committee their concerns that, under National Treatment obligations, the US would be able to object to criteria for funding of Australian productions by the Film Finance Corporation and Australian Film Commission.[156]

11.159 The Committee questioned DFAT representatives in relation to this matter, and notes that DFAT did not envisage any difficulties with Australia's current practice.[157] It was also suggested that tax

153 Media, Entertainment and Arts Alliance, *Submission 67*, pp. 15-16.

154 AUSFTA, Article 10.1.4(d).

155 AUSFTA, Annex II-7(h).

156 Mr Nic Herd, *Transcript of Evidence*, 19 April 2004, p. 63; Australian Screen Directors' Association and the Australian Writers' Guild, *Submission 164*, pp. 15-16.

157 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, pp. 80-82.

concessions for investment in the industry may be affected.[158] DFAT again confirmed that nothing in the Agreement restricted government flexibility in continuing to grant concessions and even extending them to other audiovisual areas.[159]

Impact on public broadcasters

11.160 Article 10.1.4(e) provides that 'services supplied in the exercise of governmental authority' do not fall within the scope of Chapter 10. service is deemed to be supplied 'in the exercise of government authority' where it is supplied 'neither on a commercial basis, nor in competition with one or more service suppliers'.

11.161 The Committee heard concerns that the ABC and SBS may not fall within the protection of 10.1.4(e). The ABC submitted that

> the Agreement does not make clear, however, the sense of 'competition' here. While the ABC does not compete with the commercial broadcasters for advertising contracts, it does operate in a highly competitive environment, particularly in respect of competition for both audiences and programs.[160]

11.162 MEAA stated that ABC's marketing activities might also suggest that it is operating 'in competition and that the SBS does compete with the commercial networks for advertising'.[161]

11.163 Taking note of these concerns, the Committee requested clarification of the position from DFAT. Dr Churche stated that

> there is nothing in any of the chapters which in any way limits government's ability to provide public services.[162]

11.164 In regard to the ABS and SBS supplying a service in competition with other suppliers, he advised

> if indeed you did have a particular government entity providing a commercial service on a fully commercial basis in competition with the private sector, then the commitments might actually be relevant. However, they would only be

158 Australian Screen Directors' Association and the Australian Writers' Guild, *Submission 164*, pp. 15-16.

159 Mr Peter Young, *Committee Briefing*, 2 April 2004, p. 40; Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, pp. 80-82.

160 Australian Broadcasting Corporation, *Submission 181*.

161 Media, Entertainment and Arts Alliance, *Submission 67*, p. 17.

162 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, p. 80.

> relevant in the sense that, if we are providing certain advantages to the government entity in that competitive relationship, then we might, under the national treatment obligation, have to extend it to US competitors. That would be the only situation. But there is certainly nothing that says that government, or government agencies, cannot continue to operate or provide public services.[163]

11.165 Mr Deady also confirmed that 'there is nothing in the FTA that affects the capacity of the government or future governments in relation to those public broadcasters'.[164]

Australian film exports to the United States

11.166 Mr Peter Higgs of the Australian Interactive Media Industry Association informed the Committee that Australia currently imports 50 times more film, digital and interactive content than it exports.[165] It was submitted that exports of the Australian audiovisual sector to the US were, in 2002, worth $10 million, in comparison to the $518 million value of US imports into Australia.[166]

11.167 In response to a question from the Committee regarding increased access to the US audiovisual market under the Agreement, Dr Churche advised that

> essentially, in terms of government restrictions, the US has taken no reservations on access to its audiovisual market. What we have here is a strong binding commitment in terms of the access of the Australian industry to that US market.[167]

11.168 However, the Music Council of Australia submitted to the Committee that

> there are no compensating concessions from the USA in the cultural area. The only US concessions that would be of significance to Australia would require US government intervention to provide special access to the US market for, for instance, Australian audiovisual product. Our negotiators proposed that the US introduce a foreign content quota for

163 Dr Milton Churche, *Transcript of Evidence*, 14 May 2004, pp. 80-81.

164 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 75.

165 Mr Peter Higgs, *Transcript of Evidence*, 19 April 2004, p. 3.

166 Australian Screen Directors' Association and the Australian Writers' Guild, *Submission 164*, p. 1.

167 Dr Milton Churche, *Committee Briefing*, 2 April 2004, p. 42.

> television, possibly more in jest than as a concept that the US government would be likely to entertain.[168]

11.169 The Committee heard evidence from members of the Australian Coalition for Cultural Diversity that the US is one of the most closed audiovisual markets, and that even if Australia were able to trade in that market, it would be doubtful that the US would buy Australian product.[169] It was acknowledged, however, that this is not a weakness of the Agreement, but rather, is intrinsic to the market itself.

> The truth was that we had very little to gain, really, in terms of the opportunities that an FTA could break open. The reality we face when we face an American market is an enormous production sector which is highly vertically and horizontally integrated. Actually trying to crack that market is more difficult than an FTA is able to deal with.[170]

Consultation

11.170 DFAT has advised the Committee that it regularly consulted with members of the audiovisual industry.

> We consulted with a very wide cross-section of the industry, a large number of groups—the Australian Screen Directors Association, the Screen Producers Association of Australia, the Australian Writers Guild, the Australian Film Commission … I believe we did have very extensive consultations with all groups.[171]

11.171 Further, it was stated that

> we have actually had a regular consultation process. It is just part of our continuum. Right through the negotiations, and even before the negotiations started, we were in active dialogue. We have met with a broad range of industry players probably at least every second month for the last 14 months or so.[172]

11.172 However, the Committee notes that the Australian audiovisual industry is disappointed with the outcome of the Agreement.

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168 Music Council of Australia, *Submission 31*.

169 Ms Megan Elliot, *Transcript of Evidence*, 19 April 2004, pp. 67-68.

170 Mr Richard Harris, *Transcript of Evidence*, 19 April 2004, p. 80.

171 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 75.

172 Dr Milton Churche, *Committee Briefing*, 2 April 2004, p. 40.

Members of the industry have presented evidence that they were advised by negotiators that there would be a total cultural exemption, although with some concessions in the audiovisual area.[173] The Music Council of Australia has stated that

> because this upending of the position on culture occurred only in the final days of negotiations, it was never discussed with the cultural sector. We had never been presented with the need to consider such a policy nor to advise on its effects. The negotiators have offered no evidence that they had considered its possible effects.[174]

Concluding observations

11.173 The Committee is disappointed that mutual recognition for professional services and the issue of work visas for business people were unable to be included in the Agreement. However the Committee believes that these issues should be priorities for the Professional Services Working Group and has made recommendations to progress these matters.

11.174 The Committee carefully examined the evidence in relation to the audiovisual sector and notes that the maintenance of existing content rules in the AUSFTA will allow Australian content on free-to-air and pay TV.

173 Dr Richard Letts, *Transcript of Evidence*, 19 April 2004, p. 65; Ms Megan Elliot, *Transcript of Evidence*, 19 April 2004, p. 78; Music Council of Australia, *Submission 31*, para. 8.

174 Music Council of Australia, *Submission 31*, para. 14.