spaa
Screen Producers Association of Australia

The Secretary
Joint Standing Committee on Treaties
R1-109
Parliament House
Canberra ACT 2600
19 April 2004

Re: Australian-American Free Trade Agreement

SPAA thanks the committee for inviting the organisation to appear before it today. SPAA is the industry association of the Australian independent film and television production sector. It represents the interests of producers on issues that affect the business and creative aspects of screen production. SPAA aims to provide the environment and conditions under which a vigorous independent screen production industry can thrive in Australia.

SPAA represents independent television, feature film, animation, documentary, TV commercial and interactive media production companies as well as post-production, finance and legal companies.

SPAA believes the AUSFTA, ('the Agreement') treatment of the Audio Visual Industry delivers unprecedented US access to the Australian market, without giving Australia any better access to the US market or better terms of trade. This is at a time when the level of Australia audiovisual export earnings to the US is around $10 million (2002) compared to the value of US imports into Australia of $518million (2002).

Trade Minister Mark Vaile has stated that the Agreement retains our right to ensure local content in Australian broadcasting and audiovisual services. The attached submission explains in detail how the mechanisms and definitions enshrined in the Agreement are limited, inconsistent across platforms, and enable an unprecedented US role in consultation prior to Australian Government implementation of allowable regulation changes and adjustments over time.

In the area of Australian Content on Commercial Television the Agreement has not only adopted the US standstill position but with the inclusion of 'ratchet provisions' provides a basis upon which Australia can be pressured into moving towards progressive liberalisation.

The ability for the Australian government to introduce regulation in PAY TV is significantly limited in scope. The audiovisual industry has already witnessed the results of current subscription television regulations where a 10 per cent expenditure quota for drama channels has delivered a mere three per cent of

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Australian content. A slight advance on this is the most that Australia can hope for the life of the Free Trade Agreement.

The maximum allowable regulation levels for Australian PAY TV within the Agreement are extremely low compared to the international environment. Included in the Appendices of the Submission is a table summarising the basic Pay-TV regulation conditions as they currently exist in other parts of the developed world, including key equivalent territories such as Canada and The Netherlands.

The preservation of New Media defined as 'interactive Audio and/or video services' does not address a number of emerging technologies where interactivity is not a major component, i.e. data-casting and e-cinema. Therefore there is no reservation for regulation in the these areas which is of great concern given these type of new technologies will all greatly affect the future audiovisual market.

The mechanisms that allow possible government intervention in the new media area are also problematic.

Government investment is the cornerstone of the Independent production industry. SPAA draws particular attention to concerns regarding the status of current Federal and State Agency investment activities with attached cultural criteria under this agreement. The Agreement fails to isolate agencies from the operation of the Investment provision the Agreement, potentially allowing the US government to challenge their validity.

Finally SPAA submits that the FTA industry consultation process, whilst generating a series of meetings, was flawed, with no consultation in the final rounds nor any indication of the shift in approach and the magnitude of the decision that Australia was about to make. The Agreement fails to deliver on the previous assurances from the Australian Government that it would 'preserve our right to regulate audiovisual media to achieve cultural and social purposes'.. 'including retention of flexibility to respond to the rapidly changing nature of the sector'.

While there are no clear benefits for Australian Independent Producers within the Agreement, it is has the potential to limit our future growth in new and emerging areas of the audiovisual industry. It also limits Australia's self-determination in administering its own cultural policies in the future.

Yours sincerely,

Geoff Brown
Executive Director

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES

AUSTRALIA UNITED STATES FREE TRADE AGREEMENT AND THE CULTURAL SECTOR IN AUSTRALIA

1. INTRODUCTION

In this submission we argue that the outcomes of the Australia US Free Trade Agreement (AUSFTA) have severely constrained the ability of this and future Australian governments to determine cultural policy, giving to the government of the USA a much stronger role in the determination of that policy.

The Australian government in the terms of this agreement has constrained its ability to act by:

a) agreeing to stand still and roll back of Australian content regulation on commercial television;

b) accepting progressively lower targets for Australian content in pay television and new media;

c) failing to isolate cultural agencies such as the Film Finance Corporation, the Australian Film Commission, the Australian Broadcasting Corporation and the Special Broadcasting Service from the operation of the agreement, potentially allowing the US government to challenge the validity of their operations; and

d) agreeing to internationally controversial definitions of e-commerce and digital products.

e) moving away from the 'broad exemption' approach favoured by Australia in other trade negotiations, which will leave any delivery mechanisms outside the scope of the FTA (such as e-cinema) unable to be regulated for content in the future.

We argue that there has been no corresponding benefit for the cultural sector in Australia and that the agreement will serve only to enhance the already dominant position of the US audiovisual sector in this economy, making it harder for the Australian industry to grow. It is worth pointing out that the US already has substantial access to the Australian audiovisual market, despite the existence of local content regulations, and that the US is more interested in using an agreement with Australia to set precedents for future trade negotiations.

Limiting Australia's ability to regulate in this sector will have a serious impact on the capacity of Australian audiences to access a diverse range of Australian content in the future

We also argue that the process of consultation has been flawed and that the government changed its negotiating position in relation to audiovisual without proper consultation with the sector or consideration of the potential impact on the nation.

2. BACKGROUND TO THE AGREEMENT

2.1 Australia and the US in the WTO and bilateral negotiations prior to the AUSFTA

In November 2002 when the Australian and USA governments announced that both countries would commence negotiations for a United States Australia Free Trade Agreement, this was a year after the current round of multilateral trade negotiations commenced in the World Trade Organisation (WTO) at Doha, a few months after Australia concluded a bilateral trade agreement with Singapore and also a few months after the US concluded bilateral trade agreements with both Singapore and Chile.

The interest of the USA in pursuing bilateral agreements has been clear for some time. During the ten years or so it took to negotiate the Uruguay round that led to the formation of the WTO and the General Agreement on Trade in Services (GATS) in 1995, the USA pursued an exclusively multilateral approach to trade liberalisation. However, the failure of Seattle to initiate a new global round and the slow pace of progress since Doha has reinforced the resolve of the Bush administration to pursue bilateral and regional agreements as a means of creating a new international agenda for free trade. As the United States Trade Representative (USTR) has commented:

> *The President has promoted the agenda for trade liberalization on multiple fronts: globally, regionally, and with individual nations. This strategy creates a competition in liberalization (emphasis added) with the United States as the central driving force. It enhances America's leadership by strengthening our economic ties, leverage, and influence around the world.*[1]

Since 2002, when the Congress renewed the President's Trade Promotion Authority, the USA has completed bilateral negotiations with Chile, Singapore, Australia, Morocco and with the countries of Central America. A principal attraction of these agreements is that they include standards of trade liberalisation that are higher than has been achieved in the GATS and build leverage for the US agenda in the WTO.

Cultural policy and trade has been one area where the position of the USA has been at odds with that of many countries, including Australia. In the lead up to Australia's negotiation with the USA there were distinct differences between the two countries on the approach they took on the treatment of culture in trade agreements. The position of the Australian government had been clear and unambiguous - not to liberalise and to retain complete flexibility to pursue cultural policy objectives.

Australia did this in the Uruguay Round. Then Australia stood with the European Union and the majority of other countries in resisting the attempt of the USA to have the GATS constrain or remove the ability of countries to determine their cultural policy. Australia refrained from making any commitments to liberalise in the cultural and audiovisual sectors.

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[1] 2002 Trade Policy Agenda and 2001 Annual Report of the President of the United States on the Trade Agreements Program, p.1 At http://www.ustr.gov/reports/2002/Chapter%20I_%20Overview%20and%20the%202002%20Agenda.pdf Accessed 15 April 2004

In the lead up to the commencement of the Doha round in the WTO Australia made its position on audiovisual clear to the WTO's Council on Trade in Services when it said in July 2001:

> *"Australia remains committed to preserving our right to regulate audiovisual media to achieve our cultural and social objectives and to maintain the broad matrix of support measures for the audiovisual sector that underpin our cultural policy; including retaining the flexibility to introduce new measures in response to the rapidly changing nature of the sector."* [2]

As the negotiation progressed Australia's position did not change.

On the other hand the position of the USA in both the WTO and in its bilateral agreements has been to seek wherever possible liberalisation of barriers to audiovisual trade. Certainly this is the position advocated by its audiovisual sector, particularly the Motion Picture Association of America (MPAA)[3]. The MPAA has been opposed to any domestic measures that would impede the consumption of its member's film and television products around the world. The aggressive stance of the USA in the Uruguay round, where the USA was one of the few countries to liberalise in audiovisual, has been modified somewhat in the Doha round. The USA has recognised that the ability of countries to pursue cultural policy outcomes is an issue that has to be dealt with. In making its services requests of other WTO members in July 2002 the USTR stated in relation audiovisual that:

> *The United States request on audiovisual services is designed to contribute to the growth of the audiovisual sector of all WTO members by fostering a transparent, open and predictable environment for trade in audiovisual services while providing flexibility for members to address public concern for the preservation and promotion of cultural values and identity. With this in mind, the United States requests countries to schedule commitments that reflect current levels of market access in areas such as motion picture and home video entertainment production and distribution services, radio and television production services, and sound recording services.*[4]

In other words the USA acknowledged current cultural measures but requested that WTO members make 'stand still' commitments, which would preserve these measures, but not allow countries to undertake further measures. Despite the transparent, open and predictable nature of Australia's cultural policy the flexibility to implement cultural policy objectives would be constrained.

The structure of the GATS is such that countries must make formal commitments to subject various service sectors to the GATS disciplines, known as the positive list

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[2] Australian Intervention on Negotiating Proposal on Audiovisual Services, CTS Special Session, July 2001 at http://www.dfat.gov.au/trade/negotiations/services/audio_visual_neg_proposal.html Accessed 18 March 2004

[3] The MPAA represents the major Hollywood studios.

[4] US Trade Representative Press Release 1 July 2002, *US Proposals for Liberalising Trade in Services Executive Summary*

approach. Despite the request of the USA, in making the announcement of Australia's offers on 1 April 2003, Minister Vaile said:

> *The Government will ensure that the outcomes of negotiations will not impair Australia's ability to deliver fundamental policy objectives in relation to social and cultural goals and to allow for screening of foreign investment proposals.*[5]

As a result Australia stood by its previous stance and made no offers in audiovisual or cultural services.

Australia took this stance further as it negotiated the Singapore Australia Free Trade Agreement (SAFTA). In this agreement, the audiovisual industry successfully argued for a broad cultural exemption to the application of the free trade principles, Australia defining culture broadly enough for it to apply to culture wherever it existed, across new, emerging and future technologies.[6] This exemption is a precedent in bilateral agreements and is much wider in its scope than the exemption for audiovisual industries included in the North American Free Trade Agreement (NAFTA) between the USA, Canada and Mexico.[7]

In its bilateral agreements with Chile and Singapore the USA successfully negotiated liberalisation of audiovisual trade with those countries with a small number of exemptions.

2.2 Australia and the USA position in the AUSFTA

When it came to the negotiations over a bilateral agreement with the USA both countries made public their negotiating positions. For Australia in audiovisual it was to:

> *Ensure that the negotiations take account of Australia's cultural and social policy objectives, and the need for appropriate regulation and support measures to achieve these objectives in areas such as audiovisual media.* [8]

This was further supported by the statement of Minister Vaile that:

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[5] Minister Mark Vaile, News Release, 'Australia's Initial Offer in Services Trade Negotiation', 1 April, 2003, At http://www.trademinister.gov.au/releases/2003/mvt028_03.html Accessed 8 April 2004

[6] This exemption reserved Australia's right to adopt or maintain any measures relating to

> *the creative arts, cultural heritage and other cultural industries, including audiovisual services, entertainment services and libraries, archives, museums and other cultural services.*

Creative arts' was deemed to include:

the performing arts – including theatre, dance and music – visual arts and craft, literature, film, television, video, radio, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid arts work which uses new technologies to transcend discrete artform divisions.

[7] See Article 2107 and Annex 2106 of the NAFTA in which cultural industries are defined as audiovisual and publishing.

[8] Australia-US Free Trade Agreement: Australian Objectives, http://www.trademinister.gov.au/releases/2003/mvt013_03.html, Accessed 7 April, 2004

The Government remains committed to preserving its ability to regulate in relation to social and cultural objectives, and will ensure the FTA is consistent with that goal."[9]

The objective of the US was more generally expressed as the desire to '*Pursue disciplines to address discriminatory and other barriers to trade in Australia's services market.*'[10]

From the beginning of negotiations the US made it clear that it was seeking more from Australia than Australia had previously declared it was prepared to commit to in the WTO and that it did not support an outcome that would see a cultural exemption of the kind concluded by Australia and Singapore becoming part of the Australia US agreement. The latter being the position consistently put to the Government by the cultural sector during the negotiation.

At the start of negotiations reassuring statements were made that existing local content regulations were not within the sights of the US. Ralph Ives, chief negotiator for the US, was quoted as saying "We have absolutely no intention of eliminating the local content rules for TV broadcasting."[11] And while this did not rule out the introduction of "standstill" arrangements, the central issue for the cultural sector was how the agreement would affect Australia's ability to regulate local content in emerging digital services such as video-on-demand, e-cinema and interactive television.

The position of the Government in communicating to the sector was to continually reassure that the ability of Australia to pursue its cultural policy outcomes would not be compromised. As, for example, in this statement by the Minister for the Arts, Rod Kemp on 20 August 2003:

What the Government seeks is an agreement that will result in real economic benefits for Australia, but that does not hinder our capacity to continue to tell Australian stories, in Australian voices, to Australian and overseas audiences....
The Government will ensure that the outcomes of the USFTA do not undermine Australia's capacity to regulate to meet our cultural policy objectives. [12]

This is the position that was continually put to the sector right up until the negotiators stopped talking or consulting with the sector in the final weeks of concluding negotiation.

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[9] News Release, "Vaile announces objectives for Australia –USA FTA", 3 March 2003 http://www.trademinister.gov.au/releases/2003/mvt013_03.html Accessed 7 April 2004

[10] Ambassador Zoellick's letter to Congress 13 November, 2002, www.ustr.gov/releases/2002/11/2002-11-13-australia-byrd.PDF.

[11] Mark Day, "Australia's celluloid socialism safe in free-trade deal, says US," *The Australian,* 31 July 2

[12] Senator Rod Kemp, Speech Bangarra/Australia Council/AFC Celebration of Australian Culture, 20 August 2003, http://www.dcita.gov.au/Article/0,,0_5-2_4009-4_116509,00.html Accessed 7 April, 2004

While the Government continues to state that this is the outcome they have achieved the reality is that when one examines the agreement Australia has moved considerably from this position and adopted largely the position of the USA.

3. WHAT THE AGREEMENT SAYS

The AUSFTA is structured like most other bilateral agreements in that it starts from the proposition that everything will be liberalized, except where each party takes out reservations and exceptions from the application of the disciplines in the agreement. In general these disciplines are market access , transparency of rules and regulations, national treatment (treating the nationals of the other party no less favourably than your own) and most favoured nation (treating the nationals of the other party no less favourably than you would that of a third party).

The agreement consists of 23 Chapters, four annexes and 27 side letters. From the point of view of the cultural sector the most important chapters are those on Cross Border Trade in Services (Chapter 10), Investment (Chapter 11), Electronic Commerce (Chapter 16) and Intellectual Property (Chapter 17), as well as the reservations for non-conforming measures contained in Annexes 1 and 2.

In relation to the audiovisual the accompanying material posted on the website of the Department of Foreign Affairs and Trade (DFAT) makes the following statement:

- *The Government has protected our right to ensure local content on Australian media, and retains the capacity to regulate new and emerging media, including digital and interactive TV.*
- *The agreement ensures that there can be Australian voices and stories on audiovisual and broadcasting services, now and in the future.* [13]

This is the rhetoric, but how does it compare with what the agreement actually states? As we will argue below, while certain measures have been reserved and the freedom to act in the future is not entirely constrained the government appears to have accepted what has been described as a series of 'declining aspirations' for Australian content moving from commercial television to new media. The market share targets for Australian content, to which Australia has agreed to be bound, give the overall impression the government has conceded to the US that as we move into new media there is very little place for governments to intervene to ensure cultural objectives can be met.

This is a very significant change in the cultural policy of Australia and one which has been undertaken with no discussion of the implications for future governments.

3.1 Australian Content on Commercial Television

In commercial television the current regulation of Australian content is reserved, but subject to stand still and wind back provisions.

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[13] http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/11_audio_visual.html

The mechanisms used to bring this about are in Article 10.6 of the Services Chapter and Article 11.13 of the Investment Chapter which deal with the treatment of Non-Conforming measures. These Non-Conforming measures are government programs, such as Australian content regulation, that are inconsistent with the liberalizing disciplines in the relevant chapters and which are either maintained or adopted by the parties. The relevant articles specify that non-conforming measures listed by the parties in Annexes 1 and 2 are not subject to these liberalizing disciplines.

In Annex 1-14 Australia has listed transmission quotas for local content on commercial television, including advertising and sub-quotas for different genres of programs, as measures it wishes to reserve.

However, Article 10.6.1(c) and Article 11.13.1 (c) mean that any amendments to these non-conforming measures must be "*to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment...* " In other words the regulation cannot be increased beyond current levels and these 'ratchet provisions' mean any future change must be to wind it back.

Australian content regulation for commercial television has been in place since the early sixties. Since 1992 the Parliament has required through the Broadcasting Services Act ('the BSA') that the Australian Broadcasting Authority (ABA) must impose Australian content standards on commercial broadcasters.

The ABA last reviewed the standard publicly in 2001-02. When that review was undertaken it was not done with the prospect that it would be the last opportunity Australia would have to increase the level of Australian content required of commercial broadcasters. The review focused mainly on changes to the sub-quotas for drama, documentaries and children's programs and little attention was given to setting the overall bench mark of Australian content at a higher level.

In part this probably had to do with the fact that the transmission quota was only increased to 55% in 1998 having been first set at 40% and increased to 50% in 1970. The actual level of Australian content is slightly above this minimum level, but is not high compared some other developed nation's levels of domestic content. Certainly it is far below the level of the USA (90%) and the UK (80%).

This then is the high water mark of Australian content regulation on commercial television and we expect that the Australian government will face considerable pressure in the future to wind this back. The 'ratchet provisions' in the agreement mean that Australia has settled for dramatically reduced expectations about what the current and future governments can do to encourage Australian content on our television screens.

Australian content regulation has most often been cited by the USA as a barrier to trade. Each year the USTR produces a report to Congress on foreign trade barriers. For many years now that report has identified Australian content regulation as such a barrier. In the 2002 report the USTR said:

The United States continues to oppose discriminatory broadcast quotas and maintains that market forces best determine programming allocations.[14]

The 2004 report published after the conclusion of the FTA negotiations continues to identify Australian content regulation as a barrier to trade, but then goes on to say:

If enacted, the FTA would improve market access for U.S. films and television programs over a variety of media, including cable, satellite, and the Internet.[15]

In Australia accepting this constraint upon our freedom to act the USA has gained from Australia not just agreement to 'stand still', but also the basis upon which Australia can be pressured into moving towards progressive liberalization.

3.2 Subscription Television

In Annex 2 Australia has reserved expenditure quotas for local content on subscription television as a non-conforming measure not subject to the liberalizing disciplines in the Services and Investment Chapters. Such expenditure quotas may be imposed on subscription services providing arts, children's, documentary, drama and educational programs and these expenditure quotas may be imposed up to a level of 10% of program expenditure on these services.

Unlike the non-conforming measures reserved in Annex 1 those contained in Annex 2 are not subject to the same 'ratchet provisions' referred to above, however they are limited in the scope of action by what we believe to be arbitrary limits

The present expenditure requirement applies only to drama channels and to a limit of 10% of program expenditure. The government has been considering for at least four years whether to extend the expenditure requirement to documentary channels, but there has been no consideration given to the other formats. What is more there has been no consultation with the audiovisual sector that suggested the government was at all thinking of changing its policy in this manner. What amounts to the prospect of a significant change in the policy of the Government on Australian content requirements for subscription television has been carried out in the context of a bilateral trade negotiation, without any normal process of policy consultation, and where the only party made privy to the government's thinking on future regulation has been the Government of the USA.

The audiovisual sector has consistently argued that there should be an expenditure requirement for documentary channels, but the Government frustrated this desire by its inaction over the last four years. Does the inclusion of this limited flexibility to act indicate that the Government does now propose to act? If so, we find it odd that the venue for announcing such a policy decision is in the context of a free trade negotiation.

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[14] National Trade Estimate Report on Foreign Trade Barriers 2002, p.11 At http://www.ustr.gov/reports/nte/2002/australia.PDF Accessed 7 April 2004

[15] National Trade Estimate Report on Foreign Trade Barriers 2004, p.14 At http://www.ustr.gov/reports/nte/2004/australia.pdf accessed 7 April 2004

The Annex also makes provision for the expenditure requirement for drama services to be increased to 20%, *'upon a finding by the Government of Australia that the expenditure quota for the production of Australian drama is insufficient to meet the stated goal for such expenditure'*. This finding is to be made by a transparent process and in consultation with the USA.

The expenditure requirement for subscription television is imposed on the broadcasters concerned by provisions in the BSA. As a result of this commitment by the Government any future amendments to the expenditure requirement undertaken by the Parliament will need to be done in consultation with the USA. While it has, perhaps, always been open to the USA to participate as a party to reviews undertaken by the Government or the Parliament, we find this mandatory consultation with the USA to be an unnecessary additional constraint upon Australia sovereign right to determine its own cultural policy.

The caps on expenditures on Australian adult drama (20%) and children's, documentary, arts and education channels (10%), will be the lowest in the developed world (see Appendix 2) 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. They also distort the actual levels of local programming because they do not equate to transmission hours. We have verified that the current 10% Australian drama spend requirement only amounts to 3.8% of total transmission time.

We are also concerned 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.

Finally, 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. The SAFTA 'exemption' approach initially discussed with the industry – and put forward consistently by DFAT in negotiations, would have certainly limited levels of overall possible regulation, however it would have allowed some flexibility within these caps. This flexibility has been lost forever for subscription TV.

In all we think the outcome to be totally inadequate. Accordingly, we refute the Government's assertion that it has assured Australia's ability to regulate for cultural objectives on the Pay TV platform.

3.3 Free to air multi-channelled commercial television

Here again the Government has taken the opportunity of the free trade agreement to flag what appears to us to have been an ill thought though policy option for commercial television.

In Annex 2-6 (a) provision is made for the imposition of a transmission quota not exceeding 55% and sub-quotas for particular program formats *'where more than one channel is made available by a service provider'*. These quotas cannot be imposed on

more than two channels or 20% of the total number of channels. We understand this to mean that if the commercial broadcasters were allowed to use their current digital capacity to multi-channel then an additional two of these digital channels could have the same Australian content requirements as the existing analogue channels.

However, multi-channelling is not defined within the agreement. One can infer from the BSA that multi-channelling means the provision of another channel that is wholly or substantially different in its programming. The BSA allows the ABC and the SBS to do this, subject to limitations on the kind of programming these additional channels may carry, but restricts the commercial channels to the simulcasting i.e. providing the same channel content on another (digital) channel.

The reference to free to air multi-channelling seems to suggest that if the commercial broadcasters are allowed to provide these additional channels they will not be subscription channels. In other words these new channels would be commercial services within the meaning of the BSA, supported by advertising. The Government therefore appears to signal a policy decision that the additional digital capacity cannot be used for any other purpose, such as the provision of radiated subscription television.

In Annex 2 (b) the agreement says that if the additional channel provided in the digital mode is the rebroadcast by a commercial television service of *'a channel subject to a transmission quota over another transmission platform, the quota may be applied to the rebroadcast channel'*.

On one reading this could mean that if the commercial television service provider rebroadcast their analogue service in the digital mode then the content requirements still apply to that analogue channel in the digital mode. We assume that such a rebroadcast channel does not count as one of the two channels referred to in Annex 2 (a). If this was not the case then the flexibility to regulate has been further constrained. On another reading it could mean that a commercial television broadcaster could re-transmit a subscription channel in the digital mode and whatever content requirements applied to that channel would remain.

The point being that the language of the agreement is not abundantly clear as to the thinking of the Government on what it might want to do in relation to multi-channelling. Nor does the explanatory material provided by DFAT add much to this. Again we think this comes down to the fact that the policy discussion that should normally precede the announcement of such a policy has not been had with the industry in Australia, nor with the Parliament. In the absence of this discussion and with the vagueness of the wording has the Government really achieved what it says it intends or has it simply stored up material for future argument with the USA when it thinks it might want to implement this policy on multi-channelling?

3.4 New media

The cultural sector emphasised again and again in its consultation with the Government that it was crucial that Australia retained complete freedom to act in relation to services that have just come on stream or are on the horizon.

In a report published by the AFC last year, *Flexible Visions: A snapshot of emerging audiovisual technologies and services and options for supporting Australian content*[16] 18 new technologies or services were examined. The AFC found that out of the 18 new technologies and emerging services:

> *... nine of these have been introduced into the Australian market, while six others are planned to be introduced in the next two to three years. Australia currently regulates two of these new technologies for content – digital subscription television and advertising – due to the ease of regulatory transference into the digital realm.*[17]

These findings only served to heighten our concern that the flexibility to regulate had to be retained.

What is thought of as new media is described in the agreement in Annex 2-7 (f) as 'interactive audio and/or video services' and Australia has reserved the right to introduce measures relating to Australian content on these services, but subject to some pre-conditions to action which are discussed below.

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 technologies or delivery systems that are similarly questionable.

Given the depth of the sector's concern over this issue we are extremely disappointed that there was no consultation with the sector about what the Government was prepared to agree to in this area. Even as to whether the mechanics of what was being proposed were actually going to be workable.

We are also extremely disappointed about the pre-conditions for future action by the Australian government. 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 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. But what exactly does this mean? How low does the level of Australian content need to be before it is being

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[16] The full report can be found at http://www.afc.gov.au/downloads/policies/flexible%20vision_final.pdf

[17] Ibid, p.5

unreasonably denied? What circumstances will be considered unreasonable? Can it be applied to the overall level or to certain genres of programming?

When Australian content regulation was first introduced for commercial television it was not the case that there was no Australian content on commercial television, rather the concern was that the level was too low and that certain genres, such as drama, were not being encouraged. Will future Australian governments have the same flexibility to act in relation to new media?

What is more it will not be the case that the Australian government has to only satisfy itself before acting, it will also need to satisfy the government of the USA. As the services industry advisory committee to the USTR describes it:

> *to accommodate uncertainties relating to technological change in this sector, Australia preserved its ability to take some new measures to assure continued availability of Australian content to Australian consumers, but will have to take US trade interests into consideration in designing any such new measures.*[18]

This is a clear indication that the services sector will have strong views on what measures should be taken. We would suggest that their argument would be that any measure taken should be no stronger than and probably less than that taken in relation to other media.

One can see that at the present time Australian film and television programs are 'not unreasonably denied' access to the domestic US market by any current US government action. It is just that the US is the most insular and self sufficient audiovisual market in the world and it is not very open to imports.

Assuming that the Australian government has satisfied itself and the USA that there are grounds to act, the agreement provides that this action should *'be the minimum necessary, be no more trade restrictive than necessary [and] not be unreasonably burdensome'*. This would indicate that, in line with the reducing targets for market share in other areas, any measure a future government would seek to introduce would be very minimal indeed.

We are very concerned that in practice this test for regulatory action may be hard to meet and difficult to have effect in a globalised system of content distribution. Further we think that any attempt by Australia to act on this will be the subject of objection by the US. This is especially so when one of the criteria for triggering the dispute settlement provisions in Article 21 can be the belief by a party that a benefit it expected to accrue from the Services chapter '*is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement*'. In other words a measure could be consistent with the Agreement, but still become the subject of dispute.

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[18] Industry Sector Advisory Committee for Trade Policy Matters, Services, ISAC 13, Report on the AUSFTA, p13 At http://www.ustr.gov/new/fta/Australia/advisor/isac13.pdf Accessed 7 April 2004

Another problem is that an action can only be taken in relation to '*a service provided by a company that carries on a business in Australia in relation to the supply of that service*'. This means that there has to be a business presence in Australia. No action could be taken in relation to a business established outside Australia that used such means of delivery into Australia as satellites, internet streaming or even post, no matter how pervasive the use of that service was in Australia. This is further supported by the provision in the Cross Border Services chapter at Article 10.5 which prevents either party from requiring a domestic presence as a condition of the supply of a service.

3.5 Film and television co-productions

On a positive note in Annex 2-9 Australia has reserved the right to maintain or to enter into new official co-production agreements with other countries and this reservation seems not to be subject to any constraints.

3.6 Grants, Subsidies and tax concessions for Audiovisual production

In relation to tax concessions for investment in Australian production, in Annex 2-7 Australia has taken out a reservation for *'taxation concessions for investment in Australian cultural activity where eligibility for the concession is subject to local content or production requirements'*. This would seem to cover both the concessions available for investment in qualifying Australian films and the tax offset for higher budget films.

Australia has not taken out specific reservations in relation to grants or subsidies for audiovisual production, however they appear to be dealt with by the more general exceptions contained in the Services, Investment and Electronic Commerce chapters (See Articles 10.1.4(d), 11.13.5(b) and 16.4.3(c)). These articles provide that all or parts of the chapters do not apply to '*subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance*'.

A problem arises in the case of the Investment chapter where only Articles 11.3 (National Treatment), 11.4 (Most-Favoured-Nation Treatment), and 11.10 (Senior Management and Boards of Directors) do not apply to subsidies and grants. This means that Article 11.9, which deals with performance requirements does apply. Article 11.9.2(a) would prevent Australia imposing as a condition of a grant or subsidy a performance requirement *'to achieve a given level or percentage of domestic content'*. That is, a condition of a grant or a subsidy for audiovisual production cannot be that the production will meet minimum standards of Australian content, such as being produced, written and directed by Australians. Although, Article 11.9.3(a) would still seem to allow the imposition of a performance condition that it be made in Australia.

If this is intentional then Australia has agreed to something that will severely limit or negate its current policy on support for audiovisual production. This problem needs to be remedied and could be done so by the inclusion of an appropriately worded exemption in Annex 2.

We would also point out that these provisions on performance requirements would also constrain the kind of actions taken by State governments when making public benefits available to attract investment in audiovisual production in their state. These would include measures, such as performance conditions on making public land available for the construction of film studios as has been the case in NSW and Victoria.

3.7 Investment by government in Audiovisual production

The principal means of direct support for audiovisual production is provided through direct investment by agencies such as the FFC and the AFC. There is no specific reservation for these agencies and the programs they maintain. The largest portion of direct assistance to audiovisual production is through the FFC, which co-invests with the private sector in the intellectual property that is new Australian feature films, television drama and documentaries.

The problem is that this type of investment is not only subject to the same constraints in relation to performance requirements as outlined above, but is also subject to the most favoured nation and national treatment articles in the Investment chapter. This is because at Article 11.17.4(f) the definition of investment covered by the chapter specifically includes 'intellectual property rights'.

The practical effect of this drafting is that Australia will be completely constrained in its ability to discriminate in favour of 'qualifying Australian films' that meet the 'significant Australian content' test currently part of the trigger for FFC investment. It means that the FFC could not, on these grounds, discriminate against a US producer wishing to access investment. Nor could it defend itself against a charge by the US government that the FFC and the AFC were non-conforming measures and should be abandoned.

3.8 ABC and SBS Services

There is no specific reservation for the ABC or SBS. However, there is a general reservation in the Services and E-commerce chapters for a *'service supplied in the exercise of governmental authority'*, (Article 10.1.4(e) and 16.4.3(d)). However, in the services chapter this is qualified by saying that such a service cannot be supplied *'on a commercial basis, nor in competition with one or more service suppliers'*.

If one thinks about the services provided by the both the national broadcasters one may be able to argue that both their core radio television services are not 'in competition' with other service suppliers, but what about ABC online? There are also examples of ABC and SBS activities that are supplied on a commercial basis – merchandising, retail sales, the provision of production services to other broadcasters or the sale of advertising time in the case of the SBS.

The effect of this is that it leaves the Australian government exposed to arguments from the US that, at least the commercial activities of the national broadcasters, are not consistent with the terms of the agreement. For example, does the Australian government want to have an argument with the US that the news service provided on line by the ABC is in competition with that being provided by CNN or Microsoft or

that neither national broadcaster can undertake music or book publishing and retailing?

This same problem applies to the government owned Film Australia Ltd, which produces documentaries under the National Interest Program.

3.9 Electronic Commerce

The e-commerce chapter is modeled on that in the US –Singapore FTA. Like that agreement the chapter treats e-commerce as both a service and as a good, which is ahead of the settlement of this issue in the WTO discussions. The US has argued in that forum that e-commerce should be treated as both a good and a service, which means that it could be dealt with under both the GATT and the GATS. The advantage being that some of the disciplines in the GATT are stronger than those in the GATS, for example, the prevention of the introduction of quantitative restrictions such as quotas. The US position has been strongly resisted in the WTO by the EU, in part because it would lead to restrictions on its ability to determine cultural policy. By agreeing to these provisions on e-commerce Australia has now put itself with the USA on this debate.

The significance of the e-commerce chapter in the AUSFTA is that Australia has agreed to the inclusion of the concept of a digital product. This is defined in Article 16.8 as:

> *the digitized form, or encoding of, computer programs, text, video, images, sound recordings, and other products, regardless of whether they are fixed on a carrier medium or transmitted electronically*

The obligations in relation to digital products are national treatment, most favoured nation and non-application of customs duties. It is clear from the above definition 'digital products' includes audiovisual works that have been digitally encoded, but the provisions in relation to national treatment also seem to encompass audiovisual works that are either digitally created or are created in an analogue medium and subsequently digitized. Thus Article 16.4.1 states:

> *A Party shall not accord less favourable treatment to some digital products than it accords to other like digital products:*
>
> > *(a) on the basis that the digital products receiving less favourable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms outside its territory;*
> >
> > *(b) on the basis that the author, performer, producer, developer, or distributor of such digital products is a person of the other Party or a non-Party; or*
> >
> > *(c) so as to otherwise afford protection to other like digital products that are created, produced, published, stored, transmitted, contracted*

for, commissioned or first made available on commercial terms in its territory.

The most favoured nation provision is couched in similar terms. Taken together these provisions are somewhat stronger than similar provisions in the services and investment chapters and represent the resolve of the US to ensure that there are no barriers to trade in the digital world.

If these provisions were the only thing standing then it would mean that in the digital realm Australia's ability to pursue its cultural policy would be completely constrained. However, the agreement provides that the national treatment and most favoured nation provisions do not apply to the measures set out in the Annexes, or to subsidies or grants and government services.

While this appears to give some comfort on audio-visual the problems outlined above in relation to investments, grants, subsidies and government services remain the same whether the product is analogue or digital.

Furthermore, the definition of 'digital products' contained in the e-commerce chapter is wider than the undefined 'interactive audio and/or video services' referred to in Annex 2. We are forced to ask why one would use the term 'interactive audio and/or video services' in the Annex, if one did not intend it to have a different, and potentially more restrictive meaning, than 'digital products'?

This raises the prospect of future arguments over what should be bound by the e-commerce chapter and what action Australia might be able to take under the scope of the non-conforming measures in Annex 2. It will be strongly in the favour of the US to argue that as much as possible should be regarded as a digital product, since then Australia would be constrained from acting.

3.10 Intellectual Property

Australian copyright law will be more closely harmonised with the USA, including extending the term of copyright by 20 years and increased measures against unauthorised use.

There are differences of opinion among the members of the cultural sector about the effect of this harmonisation, and the impact that decisions could have on creation and use of intellectual property in Australia. However, we are disappointed that the concessions made in the intellectual property chapter did not translate into a better deal in the audiovisual chapter.

We informed DFAT that the US audiovisual industry saw intellectual property as the 'main game' and that making concessions in this area should be seen as part of an overall concession in regards to audiovisual services. DFAT indicated that the Government was unwilling to make any concessions to the US on intellectual property.

We are disappointed that the Australian Government ultimately made concessions in intellectual property, without extracting a better deal from the US on audiovisual services.

4. PROCESS

4.1 Consultation

It is our submission that the process of consultation undertaken by DFAT and by the negotiators has been flawed. While there was certainly a lot of contact and discussion going into and during the negotiation, when the crucial moment came to make decisions the audiovisual sector was not consulted, nor given any indication of the magnitude of the concessions that Australia was about to make. Now that the negotiation has been concluded there are imperfect mechanisms available to deal with the consequences of what we believe to have been a poor deal.

The National Interest Analysis (NIA) prepared by DFAT and submitted to the Joint Standing Committee on Treaties says the following about the consultation process:

> *DFAT and the Department of Communications, IT and the Arts also held regular meetings with representatives of the cultural and audiovisual industries on the treatment of culture and audiovisual services in the negotiations.* [19]

We acknowledge that there were regular meetings, however we wish to dispel any impression that the sector was in agreement with the outcome. The NIA does not state that the outcome of the negotiation was far from the result being sought by the sector, that the industry is not happy with the result and that the final outcome was in stark contrast to the position discussed with the industry prior to the final round of negotiations in Washington.

There was no consultation with the sector when the government changed its negotiating position from seeking an overall exemption for culture in general to one where it submitted to stand still and limited reservations. If this change of position was decided prior to the final formal phone hookup between the audiovisual industry and the DFAT negotiators in December 2003, the industry was not informed of this change.

The cultural sector was always concerned about the haste with which the negotiations were conducted, as this did not allow the industry to fully assess and brief DFAT on the potential downsides of certain concessions. The consultation process was extremely general, and the industry was not shown any draft text until extremely late in the negotiation process, in stark contrast to the information that the US industry was able to gain access to during the negotiations (see below).

4.2 Approval of the agreement

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[19] National Interest Analysis, p.11
http://www.aph.gov.au/house/committee/jsct/usafta/treaties/niaandannexes.pdf Accessed 7 April 2004

There are considerable differences between the USA and Australia in regard to the process of entering into negotiations and approving their outcome.

In Australia the Parliament has a very limited role in determining the trade agenda of the nation. The decision to enter into negotiations with other nations is a matter of policy for the government. There is also no formal requirement for the government to consult with either the Parliament or the Australian people on the objectives and progress of any trade negotiation. However, the Minister for Trade has at his disposal a number of advisory groups drawn from Australian business and the community, in particular the Trade Policy Advisory Council and the WTO Advisory Group, and the DFAT calls for public submissions in the preparation for negotiations.

The role of the Parliament in reviewing trade agreements is also relatively recent. The Joint Standing Committee on Treaties was established in 1996 and is charged by the Parliament with the role of reviewing treaties before the government takes any action that would bind Australia in international law. While this provides a welcome opportunity for the consideration of the implications of any treaty for the nation it is by no means clear that the Parliament has the power to restrain the government from taking such action that would bind Australia in international law, even if the Parliament refused to pass legislation that transferred that obligation into domestic law.

Compare this with the situation in the USA. There the power of the President of the USA to negotiate a trade agreement stems from Congress, which is vested under the constitution with the authority 'to regulate commerce with foreign nations'. While the President has the constitutional authority to conduct foreign affairs, the practical reality is that there needs to be an effective relationship between the President and the Congress to achieve trade outcomes. This is expressed through legislation such as the Trade Act of 1974 and subsequent amendments, and the granting to the President of Trade Promotion Authority to facilitate the conduct of negotiations by the USTR. The current Trade Promotion Authority was renewed by the Congress in 2002 having lapsed in 1994. Once negotiations are concluded the President needs to submit the concluded text to the Congress for ratification. The Congress may only ratify or reject the submitted text, it cannot amend it.

The negotiation of trade agreements is conducted by the US Trade Representative, which is the name of both the Cabinet level officer representing the President and the agency that forms part of the Executive Office of the President. The work of the USTR is supported by a system of 32 advisory committees with 750 members drawn from all sectors of the US economy and including representatives from civil society groups. The committee system is established under the Trade Act and is designed to assist the administration in the formulation and implementation of trade policy, as well as in the assessment of the specific objectives and outcomes of each trade agreement negotiation.

The advisory system is arranged in three levels. At the peak is the Advisory Committee on Trade Policy and Negotiations (ACTPN), below this are five policy advisory committees and then 26 technical, industry sector and functional advisory committees. The membership of these committees is drawn from individual companies or from trade associations.

Under the Trade Act the ACTPN and each appropriate advisory committee must provide the President and the Congress with '*..an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives*' set forth in the applicable trade legislation.[20]

According to the USTR the advisory system operates so that *'during the course of negotiations, advisors review confidential texts and are asked to provide advice and input'* and they receive *'more frequent briefings during the concluding phases of trade negotiations'*.[21] The USTR also reports that in 2003

> *[The] USTR introduced a significant improvement to facilitate the work of the advisory committees, by creating for the first time a secure encrypted advisors' website with password protection. Confidential draft texts of FTA agreements are now posted to the secure website on an ongoing basis, to allow advisors to provide comment to U.S. officials in a timely fashion throughout the course of negotiations. This has enhanced the quality and quantity of input from cleared advisors, especially from those advisors who reside outside of Washington, DC and had difficulty accessing documents in the past.*[22]

This would strongly suggest that during the negotiations with Australia, the representatives of the audiovisual sector in the US were privy to the negotiating positions and documentation of the US and Australian government and were probably consulted on the final nature of the concluded deal as it was being done. The same level of access to information and consultation on the drafting of the agreement was not extended to representatives of the audiovisual sector in Australia.

Thus, unlike Australia, the elected representatives are the foundation of all power to enter into trade agreements and the Congress has legislated to ensure that not only trade policy, but also the actual negotiations themselves, is conducted under a formal and mandatory process of detailed consultation with all sectors of the community and the economy.

5. AUSTRALIA'S AUDIOVISUAL TRADE WITH THE USA

The economy of the US is carrying a large overall trade deficit, however the audiovisual sector is one in which there has historically been a healthy surplus. The US is the largest audiovisual market in the world, worth in the order of $US 110 billion in 2000. Its exports are worth in the order of $US 15 billion world wide, but it imports only a fraction of that value, making it substantially self sufficient in the production of film and television programs.

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[20] Report of the ACTPN on the US-Australia Free Trade Agreement, p.3 At http://www.ustr.gov/new/fta/Australia/advisor/actpn.pdf Accessed 8 April, 2004

[21] USTR News Release, 'Trade Advisory Groups Report on U.S.-Australia FTA', March 16, 2004 At http://www.ustr.gov/releases/2004/03/04-20.pdf Accessed 8 April 2004

[22] USTR, 2003 Annual Report of the President of the United States on the Trade Agreements Program, pp 233-34. At http://www.ustr.gov/reports/2004Annual/VI-development.pdf Accessed 14 April 2004

Australia is carrying a $647 million deficit in the trade in film and television productions. In 2001/2002 the value of imports was nine times that of exports. These fell in value for the third year in a row, reaching a ten-year low of $80 million. In 2001/02 Australia received $518 million worth of film and television imports from the USA and in return exported a mere $10 million, the lowest on record. Where our exports to the USA have declined our imports from the USA continue to grow. Australia's largest export markets for audiovisual are in New Zealand and in Europe, mainly the UK and Germany.

There is nothing in the AUSFTA which would give to Australia any better access to the US market or better terms of trade. We understand that the US at present has no tariff or non-tariff barriers to audiovisual trade that would be removed as a result of this agreement. In our view the only measures that will improve the export performance of Australian film and television is improvement in the ability to access finance for production. The climate for such improvement is significantly created by the measures taken by the government to meet cultural policy objectives, such as content regulation and direct investment. However, by agreeing to the terms of the AUSFTA the Australian government is constraining its ability to act.

It will not only be ironic, but tragic, if the longer term effect of this agreement is to retard the economic development of the Australian audiovisual sector in order to give better access to the US sector in a market that it already dominates.

APPENDIX 1

CURRENT AUSTRALIAN GOVERNMENT CULTURAL POLICY OBJECTIVES FOR AUDIOVISUAL

The cultural policy objectives of the government are expressed through a range of regulatory and assistance measures designed to ensure that Australians have available to them on their screens film, television and new media that speak with Australian voices about our country and its place in the world. These measures fall broadly into three areas:

A. Regulation

Commercial television – All commercial television licensees are subject to Australian content and children's television standards that require them to broadcast minimum amounts of new Australian drama, new Australian children's programs and Australian produced television advertisements. Under the standards administered by the Australian Broadcasting Authority 55% of transmission time between 6.00 am and midnight must be devoted to Australian programs and 80% of all advertising time to Australian television commercials. In addition there are sub-quota requirements for new Australian drama, documentaries, children's drama and children's programs.

Subscription broadcasters – Channels that predominantly providing drama programs are required to devote a minimum of 10% of their program expenditure to new Australian drama.

B. Grants, Subsidies and Investment

Australian Film Commission – The AFC provides grants and investment to support the development of new Australian film, television and interactive media, as well supporting the preservation and development of Australia's screen culture and heritage through the National Film and Sound Archive and support for screen culture activities.

Film Finance Corporation Australia – The FFC provides investment in new Australian feature film, television drama and documentaries.

In addition to these Federal initiatives most state and territory governments have agencies whose purpose is to provide support to film and television production through grants, subsidies and investments.

C. Tax Concessions

Concessional tax benefits are available for investment in qualifying Australian feature films, mini-series, telemovies, documentaries and animation. This measure is designed to stimulate private sector investment in Australian production.

The Federal government also provides a tax offset for expenditure in Australia on high budget productions as a measure to attract foreign direct investment in production in Australia.

D. Other measures

Like many other nations Australia has a range of film and television co-production treaties designed to allow producers from each country to pool resources for the production of film and television. Under the terms of the treaties these official co-productions access all the benefits available to national films.

Australia regulates temporary entry of foreign actors, crew and performers under Migration Regulations;

Direct support is provided for promotion of Australian production resources to AusFilm and the Film Industry Broadband Resource Enterprise (FIBRE).

Direct support is provided for training through the Australian Film, Television and Radio School.