

**SUBMISSION**  
**BY**  
**MEDIA ENTERTAINMENT AND ARTS ALLIANCE**  
**TO**  
**JOINT STANDING COMMITTEE ON TREATIES**  
**REGARDING**  
**AUSTRALIA UNITED STATES FREE TRADE AGREEMENT**

**APRIL 2004**

**The Media Entertainment and Arts Alliance**

The Media Entertainment and Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

**“So, the old debate about Australian culture and how to defend it from international predators has returned. Perhaps the reason why the issue keeps resurfacing is that so many of us Australians assume the national culture to be something other than ourselves, rather than something which we all help to generate. A living culture is what each individual makes it in the here and now, and this immediacy will continuously re-create Australian culture ...**

**“A living national culture empowers ordinary citizens. The more individuals are actively involved in maintaining and recreating that culture, the more vigorous it becomes.”<sup>1</sup>**

Stephen Crabbe

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<sup>1</sup> *Giving our culture a new voice*, Stephen Crabbe, first published by *On Line Opinion* and republished in *Sydney's Child*, Volume 14, No. 4, April 2004, pages 12 and 13

**“The decisions we make today will affect the kind of Australia our children and grandchildren will live in. The time to start thinking about these issues is now. There is no need for panic measures. But there is a need for careful and determined policy. What we decide in the next few years will have a significant bearing on our quality of life and our children's future.”**

Peter Costello, Treasurer, speaking at the release of *Australia's Demographic Challenges* on 25 February 2004<sup>2</sup>

Speaking about the need to address the aging of the population, Treasurer Costello commented on the impact the decision making of today will have on the nation's children and grandchildren. How an increasingly aging population will be able to achieve financial security will be informed by public debate, robust interrogation within the context of a considered time-line to prevent rushed decisions and examination by the parliament prior to determinations being implemented. Conversely, the future of the nation's children, grandchildren and their children and grandchildren will be affected in ways that will not be the subject of similar democratic scrutiny.

The proposed Australia United States Free Trade Agreement (AUSFTA) includes commitments that cannot be revisited, commitments to the liberalisation of the audiovisual sector that are contrary to Government policy, the effects of which will be felt by generations of Australians not yet born. The AUSFTA includes commitments that are contrary to longstanding government policy, policy that shares bipartisan support.

**“A constant challenge to our distinctive Australian cultural identity is the rising tide of global American monoculture. As with all things, we must maintain a sense of proportion but it represents more than a nagging concern. It represents a powerful reason for the maintenance of local content requirements, as well as continued public support, in appropriate ways, for the arts.”**

*Politics and Patriotism, A Reflection on the National Identity Debate*, an address by The Hon Jon Howard MP on 13 December 1995 at the Grand Hyatt Hotel, Melbourne.

A free trade agreement between the United States and Australia was first mooted in 1934 but came to nought. In the 1990s, a free trade agreement was again on the table.

In 1992, the first Bush administration raised the idea with the Keating Government and the Clinton administration raised it with the Howard Government in 1997. The Howard Government gave the idea the same cool reception that it had met five years earlier with Prime Minister Keating. Both the Keating and Howard Governments shared a trade policy that focused on multilateral trade liberalisation through the World Trade Organisation (WTO) and APEC (Asia-Pacific Economic Cooperation), an approach that had firmed under the Hawke Government in the wake of deliberations following the negotiations for the North America Free Trade Agreement (NAFTA).

In the wake of the collapse of the World Trade Organisation (WTO) negotiations in Seattle in November 1999, Prime Minister Howard revisited the concept of bilateral agreements in 2000. Across the Pacific, the Trade Promotion Authority Act of 2001 was introduced into the United States House of Representatives on 13 June 2001 and President Bush launched an aggressive agenda of trade liberalisation. The Trade Promotion Authority Act passed through Congress in August 2001 opening the way for the United States Trade Representative to participate in the next round of WTO negotiations and to embark on a raft of bilateral and plurilateral trade agreements. Visiting Washington in September 2001, Prime Minister Howard raised the possibility of a free trade agreement between Australia and the United States but, despite America's aggressive trade negotiation agenda, this time the idea met with polite disinterest.

Nine months later, Prime Minister Howard returned to the United States and President Bush and Prime Minister Howard announced agreement had been reached to negotiate a free trade agreement between Australia and the United States.

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<sup>2</sup> Posted on *On Line Opinion* on 8 March 2004 and available at [www.news@onlineopinion.com.au](http://www.news@onlineopinion.com.au)

Whilst much happened in international affairs between 1999 and 2002, the Alliance nonetheless questions whether sufficient happened to warrant a reversal of Australia's trade policy from a position of reliance on multilateral negotiations to bilateral negotiations with the strongest economy in the world. Certainly, nothing that happened between the time of the Seattle WTO negotiations and Australia deciding to negotiate an agreement with the United States warranted Australia walking away from long standing bipartisan support for Australia being free to determine its own cultural and social policy. Indeed, securing an Annex II reservation of the kind achieved in the Singapore Australia Free Trade Agreement (SAFTA) was the objective of Australia's trade negotiators.

During the negotiations, detractors argued that Australia did not have the negotiating strength to achieve concessions from the United States in many key areas like agriculture and shipping. Others, including the Alliance, were concerned that Australia might need to make concessions that were not in the best interests of Australia's social and cultural policy.

In the wake of the free trade agreement negotiations and whilst Australians await new economic modelling commissioned by the Government that will put dollars on the text, what is clear is that many of the Government's stated objectives have been considerably compromised.

The Centre for International Economics (CIE) was commissioned by the Federal Government in 2001 to examine the possible impact of an AUSFTA. The CIE report found that the benefit for Australia could eventually result in an increase of Australian GDP of 0.33%. Put another way, in 2001 dollars the increase in consumption per Australian over twenty years could be \$750 assuming the removal of all barriers to trade. That this estimate is now over-stated is self-evident given the modelling was predicated on a substantially weaker exchange rate than is now the case – 51 cents compared with 74 cents at the time of writing this submission – and the fact that all trade barriers were not removed.

Of particular relevance to the Alliance was the fact that the 2001 CIE report, having regard to the difficulty of assessing the impact of the Broadcasting Services Act 1992 being amended to take account only of Closer Economic Relations agreement with New Zealand and not other international agreements “and the fact that there is uncertainty as to which quotas influence broadcasting decisions and the difficulty of modelling those barriers anyway [did not attempt] to incorporate these restrictions in [their] quantitative analysis”<sup>3</sup>.

What is now clear is that Government has compromised its current and future social and cultural policy objectives in agreeing to the proposed free trade agreement and has done so for as yet unquantified returns.

The Alliance believes that:

- cultural goods cannot be characterised simply as commodities;
- all countries should have the right to define their own cultural policy and to give effect to that cultural policy by whatever means it considers fit and to maintain the right to change the mechanisms of support at any time and in any manner it considers fit;
- market forces cannot guarantee the health and vitality of cultural industries nor will market forces necessarily serve the national or public interest in the most appropriate manner.

To that end, the Alliance supports:

- multilateral trade agreements rather than bilateral or plurilateral agreements;
- comprehensive reservations for cultural industries in all trade agreements that:
  - are technology neutral;
  - allow for the Government to introduce support mechanisms in any form it considers appropriate in the future to accommodate changes in technologies including the introduction of delivery platforms under development or not yet invented;

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<sup>3</sup> Economic Impacts of an Australia-United States Free Trade Area, Centre for International Economics, Canberra, June 2001, page 67

- allow for the Government to make strategic interventions at any time and in any manner it believes appropriate to maintain, strengthen or enhance development and/or the delivery of any sector or aspect of the cultural industries;
  - are self-judging and not subject to dispute;
  - are not subject to standstill, roll-back, snap-back or ratchet provisions;
  - are able to override all provisions in the entirety of the agreement.
- Australia seek membership of the International Network on Cultural Policy (INCP) and support the current moves to develop and implement an international cultural instrument on cultural diversity under the auspices of UNESCO.

### **Australia's trade negotiating objectives for audiovisual and cultural industries**

Australia's stated objectives in negotiating an AUSFTA were the same as they were when negotiating SAFTA. The objectives were the same because nothing had changed.

Since the time of the Menzies Government, it has been Government policy to make no commitments in trade agreements that might compromise Australia's ability to determine and give effect to Australia's cultural objectives.

The current Federal Government recognises the importance of the cultural sector for the country and has continued a long history of support to the sector, recognising that with a population the size of Australia's in a global market place, Australia's cultural industries need a space quarantined by Government assistance in order that it can thrive and flourish.

"In the long history of man, countless empires and nations have come and gone. Those which created no lasting works of art are reduced today to short footnotes in history's catalogue. Art is a nation's most precious heritage, for it is in our works of art that we reveal to ourselves, and to others, the inner vision that guides us as a nation. And where there is no vision, the people perish."<sup>4</sup>

Lyndon Baines Johnson

The position of the arts, entertainment and audiovisual sector requires special consideration in the negotiation of any trade agreements. 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.

Like other manufactured goods, the products created by the arts entertainment and audiovisual industries can and do vary in quality. Just as there are badly designed, cheaply produced watches and tasteless tomatoes, there are badly constructed, poorly executed plays, ballets and films. When eating a tomato, the issues that will determine consumer satisfaction will include its appearance, juiciness, use of insecticides and pesticides and genetic modification. Where it was grown will be less of an issue. If Greek tomatoes are consistently superior, the market for Greek tomatoes is likely to grow. However, the product of the arts, entertainment and audiovisual industries is intrinsically and fundamentally informed by the society from which it emanates. Consequently, audiences will respond to quality and to cultural specificity.

Both Cirque du Soleil and Circus Oz are physical circus companies. Both have an international reputation, their work has universal appeal and yet they are profoundly different. The sense of humour that informs much of the work of Circus Oz marks it as a uniquely Australian company. The society in which the company was established has informed its performance content and style. It is a culturally specific product just as productions mounted by Cirque du Soleil are culturally specific.

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<sup>4</sup> Lyndon Baines Johnson, quoted by Margaret Seares in *Small Poppy Syndrome*, an article published in *The Australian* on May 7, 2001, page 13.

Equally, whilst Australian audiences have consumed a substantial diet of American television programs for half a century, there is no confusion in the mind of the audience about the location of the creative genesis of the productions they view. American programs (whether produced in America or produced offshore in other countries – for instance, American productions shot in Australia or New Zealand) are clearly distinguishable from the Australian and British programs that are the other mainstays of Australian television broadcasting.

Around the world broadcasters find audiences for indigenous product. In some markets, certain program types do not find a local audience at all. Brazil, for instance, consumes a staple diet of locally produced “tele novellas” (what we would call telemovies) that do not find an audience elsewhere.

In the same way that Brazilians respond to locally produced programs, ratings for Australian drama series and serials and infotainment programs demonstrate audience preference for indigenous material. In 1999, *SeaChange* became Australia’s most watched drama series with an audience of 1.5 million and built during the year to become the most watched program on television with an audience of 2 million. Yet that program failed to make any financially meaningful sales in the international market.

As mini-series are the most expensive television program type to produce, they can be made only with government subsidy. When *My Brother Jack* screened in 2001, it achieved ratings of 27 attracting an audience of 1.7 million Australians, comparable with the ratings achieved by the American blockbuster *Titanic* when it screened in the same year. Despite the infrequency with which they are produced, mini-series consistently capture enormous ratings.

*Ratings for Australian mini-series<sup>5</sup>*

A Town Like Alice	48
The Dismissal	40
The Shiralee	40
Bodyline	38
Anzacs	38
Bangkok Hilton	38
Vietnam	37
For the Term of his Natural Life	37
The Potato Factory	33
Day of the Roses	32
Fields of Fire	31
Cyclone Tracey	31
Cowra Breakout	28
My Brother Jack	27
The Harp in the South	26

Thus, in short, audience expectations of the “manufactured goods” of the arts, entertainment and audiovisual industries, as with all manufactured goods, focus on the quality of the product but, uniquely, also include an expectation of access to product that is culturally specific, product that emanates from the society in which they live.

*Government support for the cultural sector*

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. To that end, all three tiers of government provide support to the sector and the federal government also legislates and regulates to ensure appropriate assistance is provided as is necessary given the circumstances of the times.

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<sup>5</sup> *Report on the film and television production industry*, Australian Film Commission and Australian Film Finance Corporation Limited, 5 November 1999, page 38 augmented by data from Get The Picture, available online at [www.afc.gov.au](http://www.afc.gov.au).

The framework of support is often characterised as a trilogy of mechanisms – content regulation (in respect of free to air television), subsidy (in respect of the visual and performing arts, literature, the audiovisual industries and public broadcasting) and bilateral coproduction treaties (in respect of feature films and certain types of television programs). However, that trilogy of support is further underpinned by tax concessions (in respect of audiovisual product), migration regulations (in respect of the right of persons from overseas to gain employment in the industry in Australia) and cross media ownership and foreign investment rules (in respect of media).

The government’s ability over the past century to introduce and amend assistance mechanisms has allowed Australia to develop sophisticated, nationally and internationally regarded arts, entertainment and audiovisual industries.

The “trilogy of mechanisms” – content regulation, subsidy and coproduction treaties – has been developed and implemented in recognition of the need to circumvent systemic market failure that would otherwise result in certain types of product not being available for Australian audiences.

#### *A complex set of interdependencies*

Behind the simplicity of the trilogy of mechanisms concept there is a complex set of arrangements and interdependencies. To consider any element of support in isolation of other sections of the arts, entertainment and audiovisual industries is to ignore the full impact of that support.

Thus, for instance, provision of government subsidy for public broadcasting has an impact on the performance of the commercial broadcasters and should not therefore be ignored in any consideration of the need for a content standard on free to air television.

In an article in *The Australian* on May 17, 2001, Margaret Seares, former Chair of the Australia Council, argued that local content on television is a complex issue, saying:

“There is a further dimension to local content, and that is the contribution content regulations and the resulting Australian productions on our airwaves have made to the lifeblood of our artistic life. There is a high degree of crossover of activity within the cultural industries that is often unrecognized by policy makers. Actors work for stage and screen; musicians write for concert hall and screen/radio; writers publish for the book market and write for the screen; visual artists create works across the spectrum.

“This is essential if we are to maintain a vigorous Australian culture in our small marketplace. The economic situation of creative artists and producers of cultural content is precarious, and very sensitive to changes in any part of the market. There is concern that loss of local content regulation will almost inevitably see a reduction of the creative and financial rewards for artists, with a resulting negative impact on the vigour and viability of Australian culture.”<sup>6</sup>

#### *Systemic market failure*

That the government provides assistance in those areas where there is market failure is not the result of product failure per se. It is the result of market size and because markets are not perfect.

Both India and the United States have viable self sustaining feature film markets. The United States has a self-sustaining television market. These countries are able to recoup costs and make profits in their own markets. India has a population of 1,033 million. The United States has a population of 285 million. They have sufficient critical mass to sustain their audiovisual industries.

Australia produces quality film and television programs considerably more cheaply than is the case in the American industry. However, with a population of 20 million, the market is too small to sustain a diverse range of program types and recoup production costs.

Put simply, some markets have competitive advantages that Australia will never overcome.

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<sup>6</sup> Small Poppy Syndrome, Margaret Seares, *The Australian*, May 7, 2001, page 13

Brazil with a population of 172 million and Japan with a population of 127 million are also able to sustain indigenous television program production industries. Both have another advantage over Australia – English is not the national language of either country and thus to some extent they are inured against competition for access to their air waves of programs from the dominant world player, the United States. Conversely, Korea, with a population more than double that of Australia at 42 million, imposes content quotas on the screening of feature films in order to foster its indigenous industry, notwithstanding that English is not their first language.

Australia has a further disadvantage, namely location. Geographical distance from major markets makes the cost of doing business – raising finance, making sales and reaching audiences – with the international industry players more expensive. This disadvantage is seen most keenly in the arts and entertainment sectors where touring internationally is often prohibitive for Australian companies whereas it is of minimal concern for producers in most European countries.

Consequently, in recognition that market failure is inevitable for certain arts, entertainment and audiovisual productions, the government provides assistance by way of subsidy, as well as through other forms of assistance such as tax concessions, content regulation and negotiated bi-lateral coproduction agreements.

Governments around the world act in a similar manner to assist their own indigenous industries. Over time, it is likely that countries that currently require less support than is the case in Australia may need to seek enhanced assistance. Markets will change over time in line with population growth and with changes in other territories.

Germany is a sophisticated market with reasonable critical mass and the protection afforded by the primary language not being English. Nonetheless, government assistance is currently substantial. Support is provided at a federal and regional level and covers film and television, and most areas of arts and entertainment. With a population of 82 million, Germany is currently the 12<sup>th</sup> largest country in the world. Yet by 2025 it is expected it will no longer rank amongst the 15 largest countries whereas China, India, the United States and Indonesia will continue to be the four largest.

#### *The economic argument for the cultural industries*

Exactly to what extent the cultural industries drive performance in other industries is difficult to quantify.

That it does make a significant contribution is recognised by the Government and business, most recently articulated by DFAT in *Australia's Trade Outcomes and Objectives Statement 2000, Looking Ahead – 2000 and Beyond*: “The Federal Government is keen to showcase Australia’s cultural exports and recognises their contribution to our international image as a sophisticated and modern country. Promoting Australia’s cultural and artistic excellence internationally, including our successful films, television programmes, music, books and performing and visual arts, also generates investment in Australia and supports other export industries, particularly tourism.”<sup>7</sup>

This position is echoed by Richard Pratt AC, who put the argument this way: “Australia’s arts and cultural life is critical in helping to define who we are as a nation. Who we are and how we see ourselves matters enormously in developing our businesses and generating wealth.”<sup>8</sup>

#### *Why audiovisual industries are particularly vulnerable in a global marketplace*

“To regard the world of communications only or predominantly as a mere marketplace for commercial interest would be the wrong approach to cope with the threats and challenges the audiovisual world is facing. It would be detrimental to humanity and therefore a fatal mistake.”

Albert Scharf, Director-General Bavarian Broadcasting Corporation;

President European Broadcasting Union - EBU<sup>9</sup>

<sup>7</sup> *Australia's Trade Outcomes and Objectives Statement 2000, Looking Ahead – 2000 and Beyond*, Chapter 6, Cultural Exports, available online at [http://www.dfat.gov.au/toos\\_chapter6.html#culture](http://www.dfat.gov.au/toos_chapter6.html#culture)

<sup>8</sup> Richard Pratt AC, Patron Australian Business Arts Foundation, available on



Television continues to be the principal source of news, current affairs and entertainment for Australians.

Australians watch an average three hours and 17 minutes television a day. More than a third of Australians are watching television between 6 pm and 10pm on any given night. Between 7 pm and 9pm more than sixty percent of all television households are tuned in. 94% of all Australian adults watch television during any given week.<sup>10</sup>

As delivery mechanisms proliferate, viewers may shift from pay television to subscription television or utilise video on demand services but what is unlikely to change is the central place broadcasting has in people's homes as the conduit for news, information and entertainment.

The Australian audiovisual market is already a remarkably open one. Of all new television programs launched in Australia between September 2002 and April 2003, 76% were from overseas, compared with 42% in the Netherlands, 33% in Spain, 9% and both Germany and the United Kingdom and only 4% in the United States.<sup>11</sup>

As overseas programs can sell into the Australian market at secondary market prices, they are particularly attractive to broadcasters looking to make returns to shareholders. The United States and the United Kingdom are able to produce programs that recoup their costs in their home markets and sales to other territories such as Australia represent profit. Thus 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.

Consequently, in the absence of content standards, Australian audiences would see a dramatic decline in Australian drama programs. That this would be the case is borne out by the example of New Zealand where, in the absence of content standards, first release local content has often been as low as 15%. Similarly, when Canada relaxed its content regulations and withdrew the subquota requirements that underpinned more expensive programming formats, drama production went into freefall.

The manner in which the Australian industry operates, its history and the difference between the Australian industries and those in other countries, and in particular the differences between the Australian and American industries, have been detailed in submissions the Alliance made to DFAT and others during 2003 (these submissions are available online at [www.alliance.org.au](http://www.alliance.org.au) and can be made available electronically or otherwise as required).<sup>12</sup> For reference, a snapshot comparison of the Australian and American audiovisual industries is attached at Appendix 1.

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<sup>9</sup> Albert Scharf, speaking at the United Nations World Television Forum 2000, 16-17 November 2000, reproduced in the Final Report, page 20

<sup>10</sup> Source – *What Australians are Watching*, Bob Peters, November 2003, published online by the Australian Film Commission in *Get the Picture*, available at [www.afc.gov.au](http://www.afc.gov.au)

<sup>11</sup> Source – Eurodata TV/Mediametrie, available online at [www.afc.gov.au](http://www.afc.gov.au)

<sup>12</sup> DFAT Inquiry into A Free Trade Agreement between Australia and the United States of America, January 2003

Office of Trade Negotiations, DFAT, Call for Public Comment – Discussion Paper on the General Agreement on Trade in Services (GATS), February 2003

Senate Foreign Affairs, Defence and Trade References Committee, Call for Public Comment on Issues for Australia in the Negotiation of the General Agreement on Trade In Services (GATS) in the Doha Development Round of the World Trade Organisation and in the Negotiation of a Free Trade Agreement with the United States Of America, March 2003

*The Singapore Australia Free Trade Agreement and the Proposed Australia United States Free Trade Agreement*

In light of the above, when Australia negotiated a free trade agreement with Singapore, it adopted negotiating objectives consistent with its position in respect of GATS, namely to secure a comprehensive self-judging reservation not subject to standstill or ratchet provisions.

The comprehensive Annex II reservation in SAFTA has thus ensured that the current and future governments would be free to give effect to Australia's social and cultural objectives in any manner they might see fit now and into the future.

The same outcome has not been achieved in the proposed AUSFTA and, if it enters into force, the current government and future governments will be considerably constrained in the manner in which they can amend and introduce mechanisms to support the cultural and audiovisual industries. Many of the tools Australia currently has in its policy toolbox will be removed.

The outcome achieved in the proposed AUSFTA represents a dramatic departure from government policy regarding the manner in which cultural industries should be treated in trade agreements. It is a departure from a policy that has enjoyed bipartisan support for more than 40 years.

**Carving audiovisual industries out of trade agreements has been Government policy for forty years, enjoying bipartisan support, most often given effect by Coalition Governments.**

- The first commercial television broadcast in Australia was in 1956.
- The Menzies Government introduced a 100% Australian content quota for commercials on free to air television in 1960, followed by the introduction of quotas requiring commercial television licensees to show 40% Australian programs, and at least one hour a week between 7.30pm and 9.30pm of programs which were "distinctly Australian in content and character".
- In the early 1960s, negotiations over the General Agreement on Trade and Tariffs included moves by the United States for liberalisation of television. The Menzies Government's instructions to the Australian delegation were that Australia "would prefer to retain complete freedom of action and not enter into any commitment on the matter, particularly at a time when the television industry in Australia is in its infancy and the lines of its development are uncertain".
- In April 1994, the General Agreement on Trade in Services (GATS) was signed and the WTO was established on 1 January 1995. Australia's policy was to make no commitments regarding the cultural industries including in respect of audiovisual industries.
- In Geneva in July 2001, the Australian Government made an intervention in the GATS negotiations stating: "Australia has long recognised the essential role of creative artists and cultural organisations in reflecting the intrinsic values and characteristics of our society, and is committed to sustaining our cultural policy objectives within the context of multilateral trade agreements."
- In 2003, the Australian Government negotiated two trade agreements, one with Singapore, the other with Thailand.
- SAFTA is a 'negative listing' agreement and Australia negotiated a comprehensive Annex II reservation for all of Australia's cultural industries.
- The Agreement with Thailand is a 'positive listing' agreement, predominantly addresses trade in goods rather than trade in services, and Australia made no commitments in respect of our cultural industries.

The proposed AUSFTA will create a precedent from which Australia might never retreat and will seriously undermine Australia's position in respect of the GATS where Australia has to date made no commitments. How Australia might be able to maintain its current position under GATS and simultaneously grant so many concessions to the United States under the terms of the proposed AUSFTA will be a high wire walking act with no safety net.

The Government considered Australia's cultural negotiating objectives to be so important as to ensure they were protected in SAFTA. Yet, in the proposed AUSFTA, where Australia is negotiating with a country that is the pre-eminent producer of audiovisual programs globally and where both countries

share English as a first language, the protections achieved in SAFTA have been profoundly compromised.

## **Singapore Australia Free Trade Agreement**

### **Annex II Reservation**

#### **“Broadcasting and audiovisual, entertainment and cultural services**

“Australia reserves the right to adopt or maintain any measure with respect to:

- the creative arts, cultural heritage and other cultural industries, including audiovisual services, entertainment services and libraries, archives, museums and other cultural services;
- broadcasting and audiovisual services, including measures with respect to planning, licensing and spectrum management, and including:
  - \* services offered in Australia;
  - \* international services originating from Australia.”

Creative arts are defined as follows: ‘Creative arts’ 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.

Cultural heritage is defined as follows: ‘Cultural heritage’ includes: ethnological, archaeological, historical, literary, artistic, scientific or technological moveable or built heritage, including the collections which are documented, preserved and exhibited by museums, galleries, libraries, archives and other heritage collecting institutions.

Whilst the Alliance does not support negative listing agreements, preferring instead the positive listing approach of agreements like GATS, SAFTA nonetheless delivers strong protections for Australia’s cultural industries that reflect Australia’s stated cultural policy objectives.

Conversely, in the proposed AUSFTA Australia’s compromised position will be as follows:

- an Annex I reservation grandfathering the existing 55% transmission quota and the existing 80% advertising quota on free-to-air television both subject to ratchet provisions and allowing for subquotas for particular formats such as drama and documentary programs;
- an Annex II reservation for pay television that restricts Government intervention in this medium to an expenditure requirement, restricts the application of such a mechanism to drama, children’s, education, documentary and arts channels, caps the expenditure mechanism at 20% for drama channels and 10% for the other channels, and requires prior consultation with the United States before the current expenditure requirement of 10% in respect of drama channels can be increased and before the introduction of an expenditure requirement in respect of children’s, education, documentary and arts channels;
- an Annex II reservation for multichannelled free-to-air commercial television broadcasting services that allows for the existing quotas on free-to-air television to be extended to one additional channel but in the event the number of multi-channels (including the primary channel) exceeds ten, the quota may be applied to one further channel;
- an Annex II reservation for interactive audio and/or video services that allows for the introduction of measures to ensure Australian content on these services is not unreasonably denied to Australian consumers;
- an Annex II reservation allowing for a 25% transmission quota for local content on free-to-air commercial radio broadcasting services;
- an Annex II reservation for taxation concessions for investment in Australian cultural activity where eligibility for the concession is subject to local content or production requirements;
- an Annex II reservation enabling Australia to adopt or maintain preferential co-production arrangements under the Australian Government Co-Production Program for film and television productions conferring national treatment on productions covered by the program, including in respect of access to finance and tax concessions;

- an Annex II reservation for spectrum management;
- an Annex I reservation grandfathering existing foreign ownership restrictions in the broadcast and newspaper sectors, subject however to ratchet provisions that mean while existing non-conforming measures can be maintained, they can only be reduced not increased;
- an obligation to extend copyright term to life of the author plus 70 years for works such as books, photographs, sheet music and art works and 70 years after publication for audiovisual productions and sound recordings.

Usefully,

- the agreement is not intended to cover government subsidies and grants;
- the agreement is not intended to cover “services supplied in the exercise of governmental authority” defined as being “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers”;
- the agreement does not impose any obligation “with respect to a national of the other Party seeking access to its employment market, or employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment”; for certainty, the Exchange of Letters on Immigration Measures provides that “no provision of this Agreement shall be construed as imposing any obligation on a Party regarding its immigration measures”;
- the agreement includes an Annex II reservation identical to that contained in SAFTA reserving Australia’s “right to adopt or maintain any measure according preference to any indigenous person or organisation or providing for the favourable treatment of any indigenous person or organisation in relation to acquisition, establishment or operation of any commercial or industrial undertaking in the service sector” including with respect to investment.

### **Free-to-air commercial television and subscription television**

A 40% overall transmission quota on free to air commercial television was first introduced in 1960, effective from 1961, and increased to 45% from 1964. It was further increased to 50% in 1965 and in 1998 was increased to the current level of 55%. It is quite possible that in a multi-media world a future government may wish to see the quota increased further.

The content quota for commercials on free-to-air television was first introduced in 1960 as a 100% quota, allowing only for some exceptions such as advertising for foreign films. It remained a 100% quota until 1992 when it was reduced to 80%. The impact of that reduction on the commercials industry has been considerable with a loss to the Australian industry of many high budget campaigns, these now increasingly being, to the extent that national laws allow, produced as global campaigns.

The Annex I reservation in the AUSFTA allows for subquotas for particular program formats, like drama and documentary, to be applied within the 55% overall transmission quota.

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 non-conforming 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% 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.

Whilst the networks often broadcast between two and five percent more Australian content than is required by the overall transmission quota, this is not the case with programs broadcast to meet the subquota requirements. With the stand-out exception of Network Seven in respect of adult drama, compliance with adult drama, documentary and first release children’s programs and children’s drama programs is driven by the need to satisfy the quota as can clearly be seen by the ABA’s compliance figures for 2002 – see Appendix 2.

Consequently, it is of real concern if Clause 10.6.1 means that the subquotas cannot be increased. Current requirements are woefully low for first release children's drama programs and documentaries – respectively 32 hours and 20 hours annually. The need for these particular subquotas to increase in the near future may well become urgent given the constraints that have been agreed in the AUSFTA in respect of content standards for pay television (see below).

The manner in which the Annex I and Annex II reservations have been drafted has cemented an imbalance of obligations between those that can be imposed in respect of free-to-air commercial networks and those that will apply to pay television and other media.

In its submission to the ABA Review of the Australian Content Standard in 2002, the Federation of Australian Commercial Television Stations stated, “commercial broadcasters spent at least \$596.6 million on Australian programming in 2000. Australian programs represent about 70% of the total programming expenditure by commercial networks.”<sup>13</sup>

Conversely, the AUSFTA locks in maximum expenditure requirements for pay television at a possible 20% for drama channels and at 10% for education, children's, arts and education channels.

When legislation was introduced in respect of pay television in 1992, it incorporated a 10% expenditure requirement for predominantly drama channels. However, as the industry developed along different lines than those anticipated in the legislation, the 10% expenditure requirement was not enforceable. The legislation was reviewed in 1997 and amended in 1999 to make the requirement enforceable.

In recognition that it was legislating for an industry in its infancy with high start-up costs, initial regulation was light touch. However, it was anticipated in 1992 that the expenditure requirement for predominantly drama channels would increase over time and be applied to other channels.

In the review of subscription television conducted by the ABA in 2003, the Alliance argued that in order to give effect to the Government's economic, social and cultural objectives as articulated in the Explanatory Memorandum to the Broadcasting Services Bill 1992, the Explanatory Memorandum to the Broadcasting Services Amendment Bill (No 3) 1999 Regulatory Impact Statements and elsewhere, it was appropriate for the content requirement for predominantly drama channels to be increased and for a content standard to be introduced in respect of other subscription television channels. Additionally, the Alliance argued that it was appropriate for a content standard to be introduced in respect of advertising, a matter not previously canvassed, largely no doubt as a result of the legislative prohibition on the broadcasting of advertising or sponsorship announcements before 1 July 1997.

Just what might be appropriate levels for expenditure requirements in future decades given changes in the broadcasting landscape remains to be seen. Unfortunately, future governments will have no latitude to act beyond the very tightly circumscribed levels now mandated in the AUSFTA.

Future governments may conclude that a maximum 20% expenditure requirement for drama channels and a maximum 10% on arts, education, documentary and children's channels is inadequate to give effect to policy objectives given the low level of content that such expenditure requirements drive. Australian Film Commission research demonstrates that a 10% 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% which is likely to deliver six to seven percent content.

Such negligible levels of content was probably not what The Hon. Peter McGauran, Minister for Arts and the Centenary of Federation, had in mind when introducing the Broadcasting Services Amendment Bill in 1999 to make the drama expenditure requirement mandatory:

“The Government recognises the important role of television drama in developing and reflecting a sense of Australian identity, character and cultural diversity. The aim of the licence condition is to require the subscription television industry to contribute to the production of Australian drama programming for the cultural benefit of Australian audiences. The licence condition will also promote

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<sup>13</sup> Submission to the Australian Broadcasting Authority, Review of the Australian Content Standard, Federation of Australian Commercial Television Stations, 18 February 2002, page 11

the further development of the highly acclaimed Australian production industry, providing further employment opportunities and new Australian product for export ... The Government will closely monitor the operation of the enforcement measures in the Bill to ensure that they are effective in delivering the intended policy objectives.”<sup>14</sup>

The requirement resulted in an annual aggregate expenditure by the subscription television sector of \$19.9 million in 2001/2002 compared with \$119 million expended on Australian drama by the three commercial free-to-air networks.<sup>15</sup>

Consequently, it will not be surprising if the free-to-air broadcasters consider the imbalance of obligations contained in the AUSFTA to be unfair. The AUSFTA has effectively ensured that the free-to-air broadcasters bear the lion’s share of the responsibility for the delivery of Australian programs to Australian audiences notwithstanding how the media landscape changes in coming decades. As a result, the government is likely to come under increasing pressure for the content quotas on free-to-air television to be reduced – and given the ratchet provisions that apply to Annex I reservations, once reduced they can never be increased.

In the event the government legislates to allow the introduction of multi-channelling, the AUSFTA includes an Annex II reservation that allows for transmission quotas for local content “where more than one channel of programming on a particular services is made available by a service provider”. However, local content quotas can only be applied to two channels, including the primary channel, unless the service provides in excess of ten channels in which case content quotas can be applied to three channels including the primary channel.

In other words, it is possible that a provider could have ten channels and content quotas could be applied to only two.

The mix of obligations contained in the AUSFTA will mean a dramatic diminution of Australian content as a percentage of overall content in broadcasting.

The Alliance has argued in previous submissions regarding a free trade agreement with the United States that Australia already has a very open broadcast market. Indeed, Australia is one of the most open broadcast markets in the world. The Government’s ability to regulate has been an effective and cost efficient mechanism by which to pursue its policy objectives of ensuring that Australian audiences have access to both Australian and overseas content.

Given that overseas content can be secured at a fraction the cost of acquiring Australian content, commercial viability will ensure that in the absence of regulation preference will be given to the cheaper product from overseas. That this is the case can, as indicated above, be demonstrated by the free-to-air networks’ compliance with current regulations. Further, the predominantly drama subscription television channels did not comply with the expenditure requirement when it was not enforceable and since it has become enforceable still rely heavily on the option to make up annual shortfalls in subsequent years – for instance, the shortfall in 1999/2000 was \$5,488,289, in 2000/2001 \$7,804,142 and in 2001/2002 \$8,246,506.<sup>16</sup>

The likely outcome will be a considerably reduced presence of Australian content in the broadcasting sector, the reduction of the Australian voice to a whisper.

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<sup>14</sup> The Hon Peter McGauran, Minister for the Arts and Centenary of Federation, Broadcasting Services Amendment Bill (No 3) 1999, Second Reading Speech, House of Representative, 6 December 1999, Hansard p. 12892

<sup>15</sup> See Commercial Television Australia comment on the Australian Broadcasting Authority Review of Australian Content on Subscription Television December 2002, available online at [www.aba.gov.au](http://www.aba.gov.au)

<sup>16</sup> See Commercial Television Australia comment on the Australian Broadcasting Authority Review of Australian Content on Subscription Television December 2002, available online at [www.aba.gov.au](http://www.aba.gov.au)

## New media

The AUSFTA includes an Annex II reservation that allows for the introduction of “[m]easures to ensure that, upon a finding by the Government of Australia that Australian audiovisual content or genres thereof is not readily available to Australian consumers, access to such programming on interactive audio and/or video services is not unreasonably denied to Australian consumers. Any measures addressing such a situation will be implemented through a transparent process permitting participation by any affected parties, be based on objective criteria, be the minimum necessary, not be unreasonably burdensome and be applied only to a service provided by a company that carries on a business in Australia in relation to the supply of that service.”

At first glance this may appear to future-proof the agreement. However, “interactive audio and/or video services” is not defined.

Australian trade negotiators advise that the term is intended to cover all forms of delivery mechanisms with interactive capability. Consequently, they argue e-cinema would definitely not be captured but most other new media, such as video on demand (VOD), would be.

The Alliance is very concerned that the intended meaning given by Australian negotiators might not be the meaning given by American service providers.

The Alliance questions the use of the term “video services”, particularly given that the use of 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 and pay-per-view (PPV) because the services are delivered to a delivery platform with interactive capability.

The Australian Film Commission recently examined emerging audiovisual technologies and services and the options for supporting Australian content in a paper entitled *Flexible Vision*<sup>17</sup>.

The report finds that “VOD and PPV services can be seen as an extension of a subscription television service, whereby viewers must pay for the right to view a program, but on a per-program basis, rather than on a per-channel package basis.”

Whilst at present whether subscription television is rightfully described as an interactive service or not might seem simply a matter of semantics, it will become crucial to those charged with giving effect to Australia’s cultural policy in years to come.

Just how VOD and PPV could then be distinguished as an interactive service and subscription television be treated differently will no longer be a matter of semantics. Rather it will be a matter over which the Australian government might be exposed to challenge if it accepts the negotiators’ view that VOD is an interactive video service and moves to regulate for Australian content.

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

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<sup>17</sup> *Flexible Vision, A snapshot of emerging audiovisual technologies and services, and options for supporting Australian content*, Australian Film Commission, November 2003, available online at [www.afc.gov.au](http://www.afc.gov.au)

will hardly be creating a level playing field for Australian businesses to compete with those from overseas.

In large part due to the relatively low takeup of pay television services to date and the very low penetration of broadband services, Australia does not currently regulate in respect of VOD services which nonetheless are widespread in hotels and motels. Canada, on the other hand, does regulate content in VOD services. In 1997 five licences were issued with licensees required to meet the cultural objectives of the Canadian broadcasting legislation. VOD licensees contribute five percent of gross annual revenues to an independently administered Canadian production fund. Additionally, Canada imposes licence conditions specifying minimum levels of Canadian titles that must be carried as a ratio to all programs available on the service, Canadian titles must be given as much prominence on their menu navigation system as foreign titles and minimum numbers of Canadian programs must be promoted weekly.

Canada is free to impose content requirements on service providers regardless of whether they are companies carrying on business in Canada or not.

It is only possible to speculate about whether Australia will be able to impose similar content requirements on VOD services to those that apply in Canada at some point in the future, albeit restricted to those businesses operating in Australia. It might be that the United States, who will need to be consulted in accordance with the proposed AUSFTA, will reject the possibility of Australia benchmarking itself against regulations in place in Canada to demonstrate compliance with the “no more trade restrictive than necessary” and “not be unreasonably burdensome” tests contained in the AUSFTA and suggest that reference be made to regulatory regimes in other territories, for instance, a non-English language market such as Singapore where VOD service providers are licensed but content regulation is restricted to censorship.

Finally, it should be noted that the Optus near-VOD service was deemed to fall within the provisions applying to predominantly drama pay television channels. It is not clear in the AUSFTA whether near-VOD services would continue to be captured by the pay television expenditure requirement or, given the wording of the text, the issue will need to be revisited and considered within the Annex II reservation for interactive video services.

The concerns outlined above in regard to VOD services can be applied in respect of many other services that will be rolled out in coming years. The lack of certainty in the drafting of the reservation will, if the AUSFTA enters into force, seriously compromise the Government’s ability to intervene in new media and will most likely result in a range of challenges to whatever measures they might wish to introduce.

### **Free-to-air commercial radio broadcasting services**

The proposed AUSFTA includes an Annex II reservation that allows for a transmission quota for local content not exceeding 25% of the programming on individual stations of a service provider.

The expectation had been that the agreement would, at the very least, ensure the government would be able to introduce a mandatory transmission quota for Australian music.

Currently, transmission quotas for Australian music are addressed by way of a Code of Practice which applies to both free-to-air commercial radio broadcasting services and to community radio services.

It will be a disappointing outcome if the AUSFTA delivers a less meaningful content regime for Australian music than is currently the case utilising a Code of Practice as the current reservation leaves the way open for the United States to argue that a 25% local content standard could be satisfied by commercials and interstitials.

The Alliance sought clarification from DFAT negotiators regarding the manner in which codes of practice that recommend transmission quotas would be treated in the context of the reservations taken in the AUSFTA. However, the Alliance is still uncertain whether codes of practice will need to be amended to reduce the scope of obligations to accord with the free trade agreement or whether codes



of practice might be introduced that set enhanced levels of Australian content obligations where such enhanced levels are agreed by industry participants rather than mandated by government.

### **Public broadcasters**

The DFAT backgrounder on the implications of the AUSFTA for the audiovisual sector states, “The AUSFTA will not affect the ability of either Party to provide public services, including in relation to cultural activities, such as public broadcasters (ABC and SBS), public libraries or archives”<sup>18</sup>.

Services “provided in the exercise of governmental authority within the territory of each respective Party” are excluded from coverage in the Cross-Border Trade in Services chapter provides at 10.1.4(e). A service supplied in the exercise of governmental authority is defined as meaning “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers”.

Notwithstanding DFAT’s reassurances to the contrary, it is difficult to see that this definition adequately quarantines the ABC and SBS.

Both networks are in competition with commercial networks for audiences. Both turn to ratings as an indication that they are complying with their charter obligations – for the SBS in accordance with Section 6 of the Special Broadcasting Service Act 1991, and for the ABC in accordance with Section 6 of the Australian Broadcasting Corporation Act 1983.

Additionally, SBS competes with the commercial free-to-air broadcasters for commercial advertising. It should also be noted that in a recent article in *The Age* it was mooted that the Federal Government expects that the ABC will introduce commercial advertising by the end of 2004.<sup>19</sup>

The AUSFTA defines services supplied in the exercise of governmental authority in the same way as they are defined under GATS. However, as GATS is a positive listing agreement requiring governments to make specific commitments, the AUSFTA is a negative listing agreement and liberalisation is required unless measures are expressly identified as non-conforming and reservations taken in the Annexes.

### **Performing arts**

It is intended that subsidies and grants are not covered by the proposed AUSFTA, leaving government free to provide funding to arts agencies who in turn are able to subsidise Australia’s performing arts sector and to impose content obligations and employment obligations that favour Australian artists, creators and performers.

Consequently, it comes as a surprise to read the Report of the Industry Sector Advisory Committee on Services for Trade Policy Matters to the United States Trade Representative on the AUSFTA that “Australia has provided commitments above those made in the GATS, including ... live entertainment services, news agency services, commercially provided library, archive, museum or other cultural services”<sup>20</sup>.

As the agreement does not cover subsidies, grants, taxation concessions or immigration, the Alliance is not sure where the commitments in respect of live entertainment services and other cultural services are contained. DFAT advises that the United States do not have a particular agenda to pursue in this area but it nonetheless raises serious questions about potential unintended consequences arising from AUSFTA being drafted as a negative listing rather than as a positive listing agreement. It is also of concern that whilst the United States may not have a trade agenda in respect of these services at present, they may well do so in the future.

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<sup>18</sup> DFAT AUSFTA backgrounder: The outcome on local content requirements in the audiovisual sector available online at [http://www.dfat.gov.au/trade/negotiations/us\\_fta/backgrounder/audiovisual.html](http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html)

<sup>19</sup> *The Age*, 1 April 2004.

<sup>20</sup> Report of the Industry Sector Advisory Committee on Services for Trade Policy Matters (ISAC 13) to the United States Trade Representative on The U.S.-Australia Free Trade Agreement, 12 March 2004, page 2, available online at [www.ustr.gov](http://www.ustr.gov)

## **Media ownership**

Despite the fact that the proposed AUSFTA includes substantial liberalisation of cross border trade in services and investment, the Alliance is pleased that this liberalisation will not apply to the media and telecom sectors where existing broadcast, newspaper and Telstra ownership restrictions are grandfathered.

However, it is disappointing that the existing non-conforming measures, whilst able to be maintained, are nonetheless subject to ratchet provisions and can only be amended if the amendment “does not decrease the conformity of the measure as it existed immediately before the amendment”.

## **E-commerce**

The e-commerce provisions contained in SAFTA differ significantly from those contained in the United States’ free trade agreements with both Singapore and Chile and the AUSFTA has broadly followed the American model and picks up the more expansive non-discrimination obligation in the United States Singapore agreement.

The Alliance is aware that Australia’s negotiators were at pains to ensure local content in digital products was not compromised by the provisions of the e-commerce chapter. To that end, Chapter 16 stipulates local content obligations cannot be imposed on suppliers of digital products other than with respect to those identified in the Annex I and Annex II reservations. However, the expectation had been that an Annex II reservation covering the cultural industries would be negotiated that mirrored the reservation achieved in SAFTA. The impact of the greatly reduced reservations achieved in Annex I and Annex II may well prove problematic in years and decades to come as e-commerce develops and new technologies emerge.

## **Extension of copyright term**

The AUSFTA requires that where the term of protection of a work, performance or phonogram is to be calculated on the basis of the life of a natural person, “the term shall be not less than the life of the author and 70 years after the author’s death” and otherwise it shall be “not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram”.

Consequently, contrary to Government policy Australia must extend the term of copyright by 20 years. Additionally, the agreement will allow for the United States, should it wish to do so, to extend copyright term even further.

Australia is a net importer of cultural goods and services – see Appendix 3. The extension of copyright term is unlikely to benefit Australia creators in any meaningful way. It will, however, impact adversely on creators of new works that are adaptations of other works or incorporate archival material.

The Australian Government’s position on extension of copyright term was a strongly held opposition based on the principle that extension of term beyond 50 years does not drive development of new works but does extend the point before which old works can come into the public domain and be freely available.

It was therefore surprising to learn that Australia changed its position in the last days of the negotiations.

The Alliance considers that copyright term is not a trade issue and any change to copyright law should have occurred in a manner that would have allowed for proper public debate in Australia.

## **Treatment of subsidy provided as equity investment**

As indicated elsewhere, subsidies and grants are not intended to be covered by the proposed AUSFTA. Thus, for instance, Government subsidy provided by way of appropriation to government agencies such as the Film Finance Corporation Australia (FFC) and the Australian Film Commission (AFC) could then be utilised by those agencies to making investments or provide grants to film and television

production companies to develop and produce programs and that such support to the industry not be covered by the national treatment provisions of the proposed AUSFTA.

However, the performance requirements set out in Article 11.9 in the Investment chapter appear to capture such investments. Under Article 11.9.3(a) it does however seem possible for the AFC and the FFC to impose conditions on those in receipt of grants, subsidies or investment to “locate production, supply a service, train or employ workers or expand particular facilities, or carry out research and development, in its territory” but not, under Article 11.9.2(a), be able to impose conditions to “achieve a given level or percentage of domestic content”. As the very point of these agencies is to foster programs with significant Australian content, this is no doubt an unintended consequence but it is a consequence that will severely undermine the Government’s ability to foster and support the Australian audiovisual industry, notwithstanding the reservations currently included in Annexes I and II.

### **Investor-state dispute resolution mechanisms**

The proposed AUSFTA does contain investor-state dispute resolution mechanisms. However, the door has been left open for the issue to be revisited in the event “that there has been a change in circumstances”. The Alliance is pleased that Australia resisted the United States demand for the inclusion of investor-state dispute resolution mechanisms. However, the Alliance considers that if the agreement enters into force considerable pressure will be brought to bear for Australia to renegotiate the provisions of Chapter 21 to incorporate investor-state dispute resolution mechanisms. As the opportunity for annual review exists, this is likely to become an on-going irritant.

The level of concern about investor-state dispute resolution mechanisms and desire for such to be included is widely evident in the United States and adequately articulated in the Report of the Industry Sector Advisory Committee on Services for Trade Policy Matters:

“Article 21.15 of the Agreement forbids the parties to create private rights of action for nationals of the other party claiming violations of the Agreement by the host government. Thus, the Agreement’s protections cannot be used as a basis to challenge Australian governmental action in Australian courts. While a state-to-state process remains available to enforce the investment Chapter, the Committee notes that such processes have rarely been used in investment disputes and is oftentimes a relatively politicised process. Indeed, it was because of the recognised inadequacy of such procedures that the investor-state mechanism was developed over 30 years ago ...the Committee remains extremely disappointed by the Agreement’s omission of this integral element of investment protection.”<sup>21</sup>

The Alliance is also concerned about the ability to forum shop in the event a dispute arises. As previously argued, the Alliance is not only opposed to state-investor dispute resolution mechanisms, it considers that reservations in respect of the cultural sector should be self-judging.

### **Ceding control of Australia’s cultural policy**

At the time of writing this submission, there are four ABA reviews of pay television that have either yet to be concluded or where the ABA’s reports are still with the Minister and yet to be released:

- the 2000 proposal for the treatment of pre-production expenditure in respect of the pay television drama expenditure requirement;
- the 2000 investigation into an expenditure requirement for pay television documentary channels;
- the 2003 review of Australian content on subscription television; and
- the current 2004 proposed amendments to the Australian content standard for free-to-air commercial television.

On 5 March 1999, the Federal Treasurer, The Hon Peter Costello, directed the Productivity Commission “to advise on practical courses of action to improve competition, efficiency and the interest of consumers in broadcasting services” and in doing so directed the Commission to “focus

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<sup>21</sup> Report of the Industry Sector Advisory Committee on Services for Trade Policy Matters (ISAC 13) on The U.S.-Australia Free Trade Agreement to the United States Trade Representative, March 12, 2004, page 6

particular attention on balancing the social, cultural and economic dimensions of the public interest and have due regard to the phenomenon of technological convergence to that extent that it may impact upon broadcasting markets.”<sup>22</sup> The terms of reference concluded “The Government will release and respond to the final report produced by the Commission within six months from the date it is received.”<sup>23</sup>

The Productivity Commission considered 305 submissions and 1,744 pages of transcripts of public hearings conducted in Melbourne, Sydney and Brisbane. Its report was completed in March 2000 and released by the Government on 11 April 2000 saying, “The Government will respond to the Commission’s recommendations in due course.”<sup>24</sup> Thus far, the Government has not responded to the findings of the Report.

The Report recommended in part as follows:

“To ensure that the social and cultural objectives of broadcasting continue to be addressed in the future digital media environment, the Government should:

- Commission an independent, public inquiry into Australian audiovisual and cultural policy, to be completed by 2004; and
- Following this review, but prior to the final switch-off of analog services, implement a new framework of audiovisual industry and cultural policy.”<sup>25</sup>

To date, this recommendation has yet to be implemented. Given the speed with which the media landscape is evolving, a comprehensive review of audiovisual and cultural policy is certainly advisable.

While not concurring with all of the recommendations arising from the Productivity Commission’s review of broadcasting, the Alliance strongly agrees with the thrust of the recommendation above, namely that developing and determining cultural policy should be the domain of Australians and not something that can be bargained away behind closed doors in the last hours of negotiations for a bilateral trade agreement. Nor should Australia have to justify its social and cultural policy to other governments.

A wide-ranging review of audiovisual cultural policy should have been conducted prior to the negotiations. If the proposed free trade agreement enters into force it will be too late and governments of tomorrow will find their hands tied with the only mechanism realistically available to give effect to social and cultural policy objective being the most expensive, namely subsidy.

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<sup>22</sup> Terms of Reference, Productivity Commission Inquiry into Broadcasting, available online at [www.pc.gov.au](http://www.pc.gov.au)

<sup>23</sup> Ibid.

<sup>24</sup> Press release from the Minister for Communications and the Treasurer, 11 April 2000, available online at [www.pc.gov.au](http://www.pc.gov.au)

<sup>25</sup> *Broadcasting Inquiry Report*, Report No 11, Productivity Commission, 3 March 2000, Recommendation 11.4, page 422

# Australia's audiovisual industries and cultural policies

Background information to free trade negotiations between Australia and the United States  
September 2003; revised December 2003

In the current negotiations for a free trade agreement with the United States of America (US), the Australian Government has clearly stated objectives with respect to the audiovisual sector and Australian cultural policy. Australia is committed to preserving its ability to regulate and put in place support measures to further its social and cultural objectives.

The Australian Film Commission (AFC) and other industry organisations fully support this commitment.

## The importance of government support

Existing government policies deliver Australian stories and Australian faces on Australian screens. Australian film and television has also played a central role in establishing an international profile for Australia and its culture. It is an industry of national importance and has been a great ambassador for Australia around the world.

For many years, successive Australian governments have supported Australia's cultural industries via a matrix of regulation and subsidy. This support exists to deliver cultural outcomes. Cultural policy measures can and do co-exist with a commitment to free trade. The Australian example shows how this can be achieved. Australia's regulatory measures are transparent, modest, targeted, and do not exclude foreign material. Australia remains extremely open to international trade.

## Current measures

The main measures currently used to support Australia's audiovisual industries are:

- **direct subsidy** through the Australian Film Commission, the Film Finance Corporation Australia, Film Australia, the Australian Children's Television Foundation (around US\$57 million per year) and state film agencies (around US\$16 million per year);
- **taxation arrangements** for investment in feature films, television miniseries and documentaries;
- **Australian content rules** for free-to-air commercial television, pay television and television advertising:
  - **free-to-air commercial television:** at least 55 per cent of hours broadcast by a licensee between 6 am and midnight must be Australian; this must include:
    - 1–4 hours of first-release adult drama per week (in prime time)
    - 15 minutes of first-release documentary per week
    - 2.5 hours of first-release children's programming per week;
  - **subscription television:** 10 per cent of total program expenditure by drama channels must be on Australian drama;

- **television advertising:** at least 80 per cent of advertising time broadcast by commercial television licensees between 6 am and midnight must be Australian;

- regulation of temporary entry of non-Australian residents into the Australian entertainment industry;
- international co-production arrangements;
- rules governing foreign ownership of media and cross-media ownership;
- funding of two national broadcasters: the Australian Broadcasting Corporation and the Special Broadcasting Service;
- direct support for training through the Australian Film, Television and Radio School; and
- funding of the national film and sound archive.

These mechanisms foster an environment in which a vibrant local industry can flourish, ensuring that Australians have access to distinctive local film and television programs, and thereby meeting the government's cultural objectives.

## Australia is a small market

Compared to the US, Australia is a small industry with a small market, as indicated by the following key statistics.

	Australia	US
Population:	Nearly 20 million	Nearly 300 million
Homes with TV sets:	7 million	186 million
TV ad revenue:	US\$1.7 billion	US\$4.4 billion
Cinema screens:	1,900	35,000
Features screened in last 5 years:	1,281	2,367
Box office last 5 years:	US\$2.39 billion	US\$8.7 billion
Feature production last 5 years:	Average 34 films per year worth around US\$0.1 billion	Average 656 films per year worth around US\$10.8 billion

Australia has 28 commercial free-to-air television stations affiliated with three networks; two national broadcasters; and five subscription TV operators offering up to 56 channels. In the US



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there are more than 1,500 stations, most of which are affiliated with five major networks, and 9,000 cable TV systems.

#### The Australian market is not closed to foreign films and TV programming

Cultural markets in Australia are exceedingly open to foreign competition, and are dominated by US content: the US commands a 65 per cent share of our audiovisual import trade. Recent figures from European media analysts Mediametrie reveal Australia as the most open market for television content in the world.

##### Foreign programs as proportion of all new TV programs launched September 2002 to April 2003:

Australia	76%
Netherlands	42%
France	33%
Spain	32%
Italy	17%
Germany	9%
UK	9%
US	4%

Source: Eurodata TVMediametrie

The picture is even more stark in the cinema distribution and exhibition sector. US films have taken an average 96 per cent share of the US box office over the past five years, with Australian films taking a tiny 0.18 per cent. In Australia, US films claimed 83 per cent of the box office over the same period, with the Australian share at 6 per cent.

#### Subsidy and private market investment work together

Audiovisual subsidies work as effective partners to private finance, both domestic and foreign. In 2001/02, government subsidies accounted for US\$50 million (22 per cent) of feature film and television drama funding, with US\$119 million (54 per cent) raised through Australian private investors and US\$53 million (24 per cent) coming from foreign sources.

As these figures demonstrate, no Australian feature film or television drama is produced without substantial private investment. The balance between government and private finance has evolved over decades of cultural support, and works to overcome the realities of market failure in a small nation.

#### Cultural support exists for an efficient industry

There are significant differences between Australia and the US in terms of market scale and critical mass. With a population of less than 20 million, Australia does not have the market from which local producers can recover their costs and they must rely on additional export revenues.

By contrast, US producers can recover all their costs in the US and sell into Australia at a fraction of the original production cost.

For example, a US television series costing US\$1 million per hour, fully financed out of the US market, can be sold to an Australian broadcaster for US\$20,000 to US\$65,000 per hour. An Australian series costing about US\$320,000 an hour might be pre-sold to an Australian broadcaster for half that amount and deficit-funded against potential overseas sales by the Australian production company.

This highlights the importance of Australian content requirements: without them, broadcasters would be more likely to show US programs because it costs less to import them than to produce new Australian programs.

According to AFC forecasts, changing local content standards to classify US programs as 'local' would reduce the production and broadcasting of Australian drama by 50 per cent, Australian children's drama by 75 per cent, other Australian children's shows by 75 per cent, and Australian documentaries by 50 per cent. It is also estimated that subscription television operators would halve their local drama investments.

Under this scenario, there would be a reduction in expenditure on Australian television content of about US\$49.1 million per year. This would be replaced by about US\$24.7 million in US programs.<sup>11</sup>

#### The ability to respond to future developments must be maintained

The AFC strenuously supports Australia continuing to retain its flexibility to maintain existing measures or adopt new measures for new and emerging delivery platforms, designed to support cultural policy objectives.

#### Digital content should not be treated differently

Digital content should be treated no differently from analogue versions of the same content. Digitisation is simply a means of delivery, not a new product or service.

#### Cultural reservations are not trade restrictive

A wide-ranging cultural reservation in the US–Australia free trade agreement will not restrict market access for US content:

- The US already commands a large proportion of the Australian market and does not need trade liberalization to wield the extensive market power it already has in the sector.
- Cultural industries in Australia are exceedingly open to foreign competition, and this trade equation overwhelmingly favours the US.
- Where barriers to trade exist they are for clearly stated cultural policy objectives and are transparent in their effect.
- The interests of the US audiovisual sector in Australia are not materially damaged by the existence of measures such as content regulation of Australian broadcasting services, which are designed to underpin Australia's cultural policy objectives.
- The existence in many countries of measures in support of cultural policy objectives has not prevented the US from increasing its market share in key segments of the audiovisual sector internationally.

11 The Allen Consulting Group, *Economic Impact of a Free Trade Agreement on the Arts and Culture Sector*, Sydney, 2003.

## FAST FACTS

## Audiovisual industries in Australia and the US

All currency values in US\$ (exchange rate of AUD=US\$0.65 used)



## Demographics

Area  
Population (July 2003 est.)  
GDP (2002 est.)  
GDP per capita (2002 est.)

AUSTRALIA	
7,617,930 sq km	
19.7 million	
\$528 billion	
\$27,000	

Source: CIA World Fact Book

US	
9,158,960 sq km	
290.3 million	
\$10,400 billion	
\$37,600	

CIA World Fact Book

## Film and TV drama production

No. domestic feature films per year  
– production value/negative cost  
Hours of domestic TV drama per year  
– production value/negative cost  
Spending by foreign film and TV drama productions per year

AUSTRALIA	
34	
\$109 million	
780 hours	
\$212 million	
\$104 million	

Source: AFC;  
annual averages 1998–2002;  
includes co-productions

US	
656 <sup>1</sup>	
\$10,844 million <sup>2</sup>	
not available	
not available	
not available	

Annual averages 1998–2002;  
1) MPA 2002 Market Statistics;  
2) Screen Report July 2003

## Production industry

Employment (2000)  
No. businesses  
No. employing 100+ people  
Income from TV production  
Income from feature production  
Income from TVC production

AUSTRALIA	
15,195	
1,975	
25	
\$472 million	
\$74 million	
\$186 million	

Source: June 2000  
ABS Service Industries Survey

US	
270,000	

2000  
MPA 2002 Market Statistics

## Box office

## Box office 1998–2002

– US films  
– Australian films  
US films' share  
Australian films' share  
Number of films screened  
– US films  
– Australian films  
US share  
Australian share

AUSTRALIA	
5-year total	Annual average
\$2.39 b	\$478 m
\$1.99 b	\$398 m
\$0.13 b	\$26 m
	83% of box office
	6%
1,281	256
863	173
114	23
	67% of films screened
	9%

Source: MPOAA, AFC analysis  
Australian films include  
5 co-productions

US	
5-year total	Annual average
\$38.7 b	\$7,436 m
\$36.8 b	\$7,374 m
\$0.08 b	\$16 m
	95% of box office
	0.2%
2,367	473
1,547	309
30	6
	65% of films screened
	1%

Nelson ED August 2003  
Co-productions may be included  
with foreign films

## Relative box office shares: Australia and the US total gross box office 1998 to 2002



## Cinema distribution and exhibition industries

No. active distributors (2002)  
No. cinema screens (2002)  
Admissions (2002)  
Employment in cinema exhibition (2001)

AUSTRALIA	
31 <sup>1</sup>	
1,872 <sup>2</sup>	
\$2.5 million <sup>2</sup>	
10,079 <sup>3</sup>	

Source: 1) Filmmakers Nelson ED,  
2) MPOAA,  
3) ABS 2001 Population Census

US	
90 <sup>1</sup>	
35,280 <sup>2</sup>	
1,639.1 million <sup>2</sup>	
137,700 <sup>2</sup>	

1) Filmmakers Nelson ED,  
2) 2002 MPA Market Statistics

### Home entertainment 2002

Comparable penetration except for subscription TV, which is relatively new in Australia, but much smaller numbers in Australia

Homes with TVs (2002)  
Homes with VCRs  
Homes with DVDs  
Homes with subscription TV  
Time spent watching TV (2001)



AUSTRALIA	US
7.1 million (>99%)	105.5 million (98.2%)
6.3 million (89%)	96.2 million (91.2%)
1.7 million (24%)	38.8 million (36.4%)
1.5 million (21%)	89 million (85%)
3 hr 18 min	Men: 4 hr 19 Women: 4 hr 51

Sources: COTAM

% use of TV households  
Nielsen Media Research

(on TVR Online) and to MPAA 2002 Market Statistics

### Television industry

TV stations

AUSTRALIA	US
28 commercial free-to-air stations mostly a mix of public and three major networks: TEN, Nine, Seven 2 national public broadcasting services (ABC, SBS) 3 subscription TV operators (3 of these with most of the market) offering up to 56 channels	More than 1,500, including nearly 1,000 stations affiliated with the five major networks - NBC, ABC, CBS, FOX and PBS About 9,000 cable TV systems (1997)
17,388 <sup>1</sup>	149,530 <sup>2</sup>
\$1.7 billion <sup>3</sup>	\$54.4 billion <sup>3</sup>
24% <sup>4</sup>	96% <sup>4</sup>
76% <sup>4</sup>	4% <sup>4</sup>

Sources: 1) ABS, GTP Online  
2) 2001, ABS, Population Census  
3) CECSA, GTP Online

1) CIA Fact Book  
2) 1997, US Census Bureau, Economic Census

4) Eurodata Telemedia/Infocis, proportions use of new titles (31% of new titles broadcast in Australia in this period were local, 38% from the US, 35% from the UK, and 6% other foreign sources)

3) Universal McCann, TVB Online  
4) Eurodata Telemedia/Infocis, proportions use of new titles

Employment

Total TV ad revenue (2001)

Programming (share of new programs launched Sept '02 to April '03)

- local

- foreign

### New media

Homes with a computer (2000)  
Homes with Internet access  
No. Internet users (2002)

No. Internet service providers

Mobile phones

AUSTRALIA	US
4 million (56%) <sup>1</sup>	54 million (51%) <sup>1</sup>
2.7 million (37%) <sup>2</sup>	44 million (42%) <sup>1</sup>
10.6 million <sup>2</sup> [4.2m subscribers <sup>2</sup> ]	165.7 million <sup>2</sup>
57 <sup>1</sup>	7,000 <sup>2</sup>
8.6 million (2000) <sup>1</sup>	69.2 million (1998) <sup>2</sup>

Sources: 1) ABS  
2) CIA World Fact Book

1) US Census Bureau Home Computers and Internet Use in the United States, August 2000  
2) CIA World Fact Book

### Australian audiovisual trade

Value of trade in royalties for films, TV programs and videos 1997/98 to 2001/02

#### Imports to Australia

- total value

- from the US

#### Exports from Australia

- total value

- to the US

#### Balance of payments

- total

- with the US

5-year total	Annual average
\$2,132 million	\$426 million
\$1,411 million (66%)	\$282 million
\$411 million	\$82 million
\$114 million (28%)	\$29 million
-\$1,721 million	-\$345 million
-\$1,297 million (75%)	-\$259 million

Source: ABS

### Audiovisual trade 1997/98 to 2001/02





Appendix 2

Table 1: Australian Content and Children's Television Standards Compliance - 2002

Quota	Australian Programs	Australian Drama		Australian Documentary	Australian Children's C Drama		Australian Children's C programs	Children's C programs	Australian Preschool P programs
		first release (total annual score)	hrs		score	first release (total hours)			
run	all			first release (total hours)	first release (total hours)	repeat (total hours)	first release (total hours - includes C drama)	all (total hours - all C programs)	all (total hours)
measure	per cent: 6am - 12mn								
Minimum annual requirement	55%			20 hours	32 hours	8 hours	130 hours	260 hours	130 hours
<b>Seven licensees</b>									
ATN Sydney	58.92	241.00	369.40	24.00	32.00	46.50	135.00	262.28	130.50
H5V Melbourne	60.37	241.00	369.40	29.00	32.00	47.00	135.00	263.28	130.50
BTO Brisbane	59.97	241.00	369.40	27.00	32.00	49.50	135.00	262.28	130.50
SAS Adelaide	62.70	241.00	369.40	22.00	32.50	46.50	135.00	262.78	130.50
TVW Perth	60.36	240.00	367.40	25.00	32.00	47.00	134.50	263.78	130.50
<b>Nine licensees</b>									
TCN Sydney	59.17	106.50	232.20	22.00	32.00	59.00	130.50	264.00	130.50
GTV Melbourne	59.34	106.50	232.20	21.00	32.00	59.00	130.50	265.00	130.50
QTQ Brisbane	61.24	106.00	231.20	22.50	32.00	59.00	131.00	262.50	130.50
<b>Ten licensees</b>									
TEN Sydney	57.41	168.00	225.70	22.00	32.50	68.00	130.50	260.50	130.50
ATV Melbourne	57.95	168.00	225.70	22.00	32.50	68.00	130.50	260.50	130.50
TVO Brisbane	57.64	168.00	225.70	22.00	32.50	68.00	130.50	260.50	130.50
ADS Adelaide	58.30	168.00	225.70	22.00	32.50	68.00	130.50	260.50	130.50
NEW Perth	58.34	168.00	225.70	22.00	32.50	68.00	130.50	260.50	130.50

The formula for calculating first release Australian drama programs is: Score = Format Factor x Duration of program (in hours).

- The Format Factor for drama is:
- 3.2 for a feature film, tele-novella, mini-series, or self-contained drama of less than 90 minutes' duration
  - 2 for serial/drama produced at the rate of one hour or less per week
  - 1 for serial/drama produced at the rate of more than one hour per week

### Appendix 3

#### TRADE IN CULTURAL GOODS AND SERVICES—1994-95 to 2000-01

	EXPORTS AND CREDITS (earnings).....		IMPORTS AND DEBITS (payments).....	
	Cultural goods and services(a)	Percentage of total goods and services	Cultural goods and services(a)	Percentage of total goods and services
	\$m	%	\$m	%
1994-95	462	0.5	2 976	3.0
1995-96	528	0.5	2 925	2.9
1996-97	528	0.5	3 081	3.0
1997-98	558	0.5	3 432	2.9
1998-99	658	0.6	3 633	2.9
1999-00	692	0.5	3 840	2.7
2000-01	1 776	1.2	4 075	2.7

(a) These data are derived from table 8 (exports), table 10 (imports) and table 12 (services) and include recreational services.

Source: ABS, *Balance of Payments and International Investment Position, Australia* (cat. no. 5363.0), *Balance of Payments and International Investment Position, Australia* (cat. no. 5302.0) and data derived from International Merchandise Trade.

Note: The abnormally high export earnings for the year 2000-01 arose principally due to the inclusion of the broadcasting rights for the Sydney Olympic and Paralympic Games. If the broadcast rights are excluded the total export earnings for the year were \$751 million, or 0.5% of total export earnings.

Source: Australia's Trade in Culture 2000-01, prepared by the National Centre for Culture and Recreation Statistics, Australian Bureau of Statistics, March 2003, for the Cultural Ministers' Council Statistic Working Group, page 19, available online at [www.dcita.gov.au/swg](http://www.dcita.gov.au/swg)