

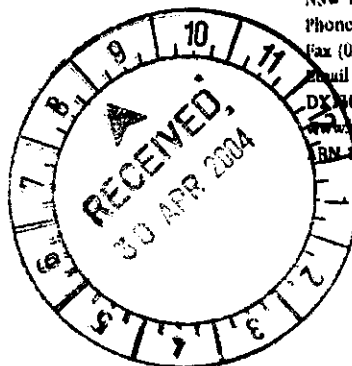
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File No: 2002/1287

30 April, 2004

Mr Brenton Holmes
Secretary
Select Committee on the Free Trade Agreement
between Australia and the United States of America
Parliament House
Canberra ACT 2600



Dear Mr Holmes

Proposed Australia-United States Free Trade Agreement

In response to the Committee's invitation of 25 March 2004, the Australian Broadcasting Authority provides the attached submission in relation to the proposed Australia-United States Free Trade Agreement. The Authority's submission relates to the Committee's Term of Reference (c):

examine impacts of the agreement on Australia's economic, trade, investment and social and environment policies, including, but not limited to, agriculture, health, education and the media.

The ABA would be happy to provide additional comment relevant to its submission should the Committee so require.

Yours sincerely

Lesley Osborne
Manager, Policy and Research



**Australian
Broadcasting
Authority**

Proposed Australia-United States Free Trade Agreement: Submission to Joint Standing Committee on Treaties

**Australian Broadcasting Authority
Sydney
April 2004**

Proposed Australia-United States Free Trade Agreement

The Australian Broadcasting Authority (the ABA) provides the following submission to the Joint Standing Committee on Treaties, in relation to the proposed Australia-United States Free Trade Agreement (the AUSFTA).

The ABA's role and interest

The ABA's comments chiefly relate to the treatment of the audiovisual industries in the proposed AUSFTA, in particular its potential impact on the community's access to Australian content on broadcasting and related audiovisual services.

This interest arises from the cultural, social and economic objectives in the *Broadcasting Services Act 1992* (the Act), which include:

- to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity and
- to promote the provision of high quality and innovative programming by providers of broadcasting services.¹

The ABA has a wide interest in ensuring that the above objectives for broadcasting are achievable now and in the future, as digital technologies change the nature of broadcasting and related audiovisual services.

The legislation gives the ABA responsibility for the regulation of Australian content on free-to-air commercial television services.² The Broadcasting Services (Australian Content) Standard 1999 sets the level for Australian programs overall and determines subquota requirements for first release adult and children's drama programs and documentaries. The Australian content standard was most recently reviewed in 2001 to 2002 to ensure the subquotas were operating effectively. The ABA is also responsible for the implementation of the Australian drama expenditure requirement for subscription television broadcasting services.³

In January 2003, the ABA made a submission to the Department of Foreign Affairs and Trade (DFAT), on Australia's negotiation of the AUSFTA.⁴ In its submission to DFAT the ABA expressed concern that the AUSFTA might lead to significant deregulation of local content on television, to the extent that such regulation does not conform to free trade disciplines. The ABA was also concerned that the AUSFTA might severely limit the future capacity of both Government and the regulator to take measures supporting Australia's cultural objectives in broadcasting.

¹ Sections 3(e) and 3(f) of the *Broadcasting Services Act 1992*

² Section 122(1) of the Act

³ Division 2A of the Act

⁴ http://www.aba.gov.au/aba/submissions/pdfs/Aust-US_FTA_Subfinal.pdf

Treatment of audio-visual services in proposed AUSFTA

Local content regulations together with other measures affecting the audiovisual sector are mainly dealt with by means of specific reservations under Annex I and II to the AUSFTA. The overall impact of these reservations is to retain current local content rules for regulated services using known technologies, while reducing the range of measures available to adjust regulation or determine new rules should changed circumstances so warrant. In relation to undefined digital services, the AUSFTA does not appear to constrain the menu of options to regulate for local content on interactive audiovisual services.

Transmission quotas for Australian programming and advertising content on free-to-air commercial television

The ABA considers the reservation dealing with free-to-air commercial television as particularly important given that this medium is likely to remain the most influential sector of broadcasting for some time. Annex I-14 to the AUSFTA retains the existing free-to-air requirements for Australian content as follows.

Transmission quotas for local content imposed on free-to-air commercial analogue and digital (other than multichannelling) television broadcasting services shall not exceed 55 percent. Subquotas for particular program formats (eg drama, documentary) may be applied within the 55% quota.

The advertising content quota of 80 per cent has also been capped, under the same Annex.

There has been some debate about the practical effect of coverage by an Annex 1 reservation. Annex 1 regulations are subject to ‘ratcheting’⁵ – that is, any unilateral liberalisation or decrease in the 55 per cent level will be immediately bound under the AUSFTA and cannot be subsequently wound back. In this regard, the ABA notes that the networks exceed the 55 per cent transmission quota that was introduced in 1996,⁶ and there has not been pressure from industry or other stakeholders for the ABA to adjust the level. The transmission quota was not considered when the Australian content standard was reviewed in 2001-2002.

Of greater significance is the potential impact of the AUSFTA on the ABA’s capacity to regulate for specific categories of Australian programming by means of subquotas in the standard. Current Australian content regulation has requirements for relatively high cost adult and children’s drama, and for documentary programs.

While all program categories contribute to the mix of Australian programs and are important to audiences, the sub-quota programs are particularly important. They provide a minimum safety net for Australian ‘voices’ in genres particularly vulnerable to replacement by less expensive genres or imports (especially adult drama, children’s programs and documentaries), notwithstanding demonstrated audience appeal.

⁵ Article 10.6.1 (c) in the Cross-Border Trade in Services Chapter

⁶ Interim network compliance results for the transmission quota in 2003 were Nine (av 64 per cent), Seven (av 57 per cent) and Ten (57 per cent)

In contrast, Australian sports, news, current affairs, lifestyle and infotainment programs, all of which are covered by the transmission quota, are much more cost effective. These programs are usually less expensive to produce, cannot be replaced with overseas material as readily, and rate well with Australian audiences. Regardless of quota requirements, commercial television schedules are likely to contain considerable amounts of these types of programs.⁷

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

In respect of the 80 per cent transmission quota for advertising content, the ABA submits that the networks seldom exceed half of the 20 per cent foreign advertising permitted under the Australian content in advertising standard,⁸ which came into effect in 1992.

Future regulation: digital media

Annex II of the AUSFTA sets out specific reservations for digital multi-channelling, subscription television broadcasting, radio and interactive audio and/or video services. While the capacity of the Government to regulate in respect of new services is not open-ended, the ABA strongly supports Australia's right to take measures to ensure that Australian consumers have access to Australian content on future digital services, including subscription services. The potential for change in broadcasting and communications services, makes it impossible to predict whether and in what form local content regulation might be necessary for future services. Given the economics of local content production, the global nature of audiovisual services, and the traditional openness of the Australian market to US entertainment products, future governments must have the power to determine whether regulatory intervention is needed in the public interest. The flexibility achieved in the treaty commitments of Annex II recognises this need.

Digital free-to-air multi-channels

The capacity to ensure local content on possible free-to-air multi-channels, provided in Annex II, is important in light of the anticipated continuing strength of commercial television in digital-era media. The ABA notes that the reservation limits regulatory options that might be considered for these services, constraining the number of multi-channels that might be regulated, and restricting the approach to the existing transmission quota model applied to single channels.

⁷ Australian Broadcasting Authority, *Negotiation of an Australia-United States Free Trade Agreement*, January 2003, p.14

⁸ Network compliance results for the Advertising content standard
<http://www.aba.gov.au/tv/content/advertising/compliance.htm#compl>

Transmission quotas capped at 55 % of overall content can be applied to no more than two channels or 20 per cent of the total number of channels (whichever is greater) operated by a service provider. The main channel is included as one of the two or three regulated channels. In practice it is likely that only the main service and one other could be subject to Australian content requirements, as each network's 7 MHz channel potentially provides for five or so multi-channels. The number of multi-channels would have to be fifteen or more, to allow local content regulations to be imposed on three channels (or 20 per cent of channels). No local content requirement can be applied to more than three channels of an individual service provider.

Depending on the number of multi-channels and the nature of the programming on these channels, the ABA accepts that the content of some of the digital multi-channels could be predominantly foreign.

The capacity to apply sub-quotas for particular program formats on each of the two (or three) multi-channels, e.g. drama, children's and documentary, within the 55 per cent quota 'in a manner consistent with existing standards'. The ABA understands that sub-quotas on multichannels would not have to be identical to existing sub-quotas, although they would be expected to be similar in nature. As with the single channel situation in Annex 1, the wording leaves the way open for new subquotas to be introduced if appropriate. The ABA considers the flexibility to apply different and possibly new subquotas is important.

Subscription television broadcasting

Unlike its role in determining local content regulation for commercial television, the ABA implements the Australian drama expenditure scheme for subscription television broadcasting set out in the Act. The ABA has a role in reviewing the regulation having been directed by the Minister to investigate local content on subscription television on three occasions. The ABA notes that the Annex II reservation enables Parliament to extend the 10 per cent expenditure quota to specified channels, such as documentary and arts channels. The expenditure requirement for drama can be raised from the current 10 per cent to a cap of 20 per cent after a finding by the Government that the expenditure quota for the production of Australian drama is insufficient to meet its stated goal for such expenditure. The Government must reach such a conclusion through a transparent process that includes consultations with any affected parties including the United States (discussed below).

The ABA understands that the AUSFTA reservation precludes any other form of regulation for subscription television broadcasting. While expenditure requirements may be the most appropriate form of regulation at the sector's current stage of development, this could change with the shift to digital transmission anticipated to increase take up of subscription television - increasing ratings and advertising revenue in the future years.

Commercial radio broadcasting services

Levels of Australian music are currently set by means of the Commercial Radio Codes of Practice, and vary depending on station format. Annex II in AUSFTA caps any transmission quotas for local content/Australian music at 25 per cent, which equates

with the highest format level currently specified in the Code. Maintaining the right to regulate for Australian music, beyond codes of practice, provides flexibility.

Interactive audiovisual services

Annex II retains the capacity for Australia to regulate 'interactive audio and/or video services' – these being understood generally as services that are driven by consumer choice, and are services provided by businesses either incorporated in Australia or aimed/marketed directly towards Australians. The ABA notes that similar to the reservation for subscription television broadcasting, such regulation would be initiated by a finding 'by the Australian Government that Australian material is not readily available to Australian audiences'. The Government can then take measures to ensure 'that Australian content on new media is not unreasonably denied to Australian consumers'. Consultation with affected parties must be conducted, presumably including the US as in the subscription television paragraphs.

Ensuring Australian material is available to Australian audiences

Some concern has been expressed about the requirement in Annex II for consultation with the US when introducing new measures for interactive audiovisual services. However, the ABA considers the threshold decision as to whether Australian audiences have ready access to local material on interactive services or not, is the more important issue.

Conclusions about possible regulation of future services should be based on sound information and have the benefit of input from all relevant stakeholders. This will require policy makers and industry stakeholders to be alert to trends in the delivery of new services and to actively monitor the availability of Australian content in the digital environment.

Consultation with the United States

While the AUSFTA creates a requirement to consult, the ABA notes that the US does not have a veto, and the wording of the relevant reservations give considerable emphasis to policy findings of the Australian government above any consultation requirements.

Historically the development of local content rules for broadcasting has involved wide public consultation. The ABA understands that no special consultation obligations arising from the AUSFTA have been stipulated. The ABA and its predecessor, the Australian Broadcasting Tribunal, has consulted with the US in past reviews of local content issues. Together with Australian stakeholders, organisations such as the Motion Picture Association of America, and the US Trade Representative, have participated in public processes. The ABA will continue its practice of open and transparent consultation, with opportunities for all affected parties to put their views - opportunities which are now enhanced by the use of emails and web publishing.

Other areas of interest to the ABA

Amongst its other responsibilities the ABA monitors broadcasters' compliance with the foreign media ownership provisions in the Act, and also manages the spectrum for television and radio services. Both of these functions are unaffected by the AUSFTA.

Foreign Media Ownership

The inclusion of foreign ownership of commercial television and subscription television broadcasting licences as Annex 1 reservations (Annex I-15) 'grandfathers' the current rules.

Spectrum management

The ABA's powers to manage the spectrum for television and radio services have been retained (Annex 11 (g)). This reservation ensures that the ABA's broader activities in relation to the assignment and management of spectrum and licensing of broadcasting services are unaffected by the AUSFTA.