

30 April 2004



**ABC**

Australian  
Broadcasting  
Corporation

The Secretary  
Senate Select Committee on the Free Trade Agreement  
between Australia and the United States of America  
Suite S1.30.1  
The Senate  
Parliament House  
Canberra ACT 2600

**Corporate Affairs**

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**Re: Inquiry into the Free Trade Agreement between Australia and the United States of America**

Dear Secretary

The ABC is pleased to contribute to the Committee's inquiry into the Free Trade Agreement between Australia and the United States of America.

I trust that the information attached will assist the Committee in its deliberations.

The contact point in relation to the submission is David Sutton, Industry Analyst, ABC Corporate Planning and Governance. He may be contacted at (02) 8333 2429, or by mobile phone on 0409 241 846.

Yours sincerely

Geoffrey Crawford  
Director  
**Corporate Affairs**



**Senate Select Committee on the Free Trade Agreement  
between Australia and the United States of America**

**Inquiry into the Australia-United States Free Trade Agreement**

Submission from the Australian Broadcasting Corporation  
April 2004



## **Australian Broadcasting Corporation Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America**

The Australian Broadcasting Corporation (ABC) welcomes this opportunity to make a submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America in relation to the draft Australia–United States Free Trade Agreement (AUSFTA).

As the national broadcaster, the ABC is a producer and co-producer, purchaser and vendor of audiovisual cultural products. In line with its Charter, the Corporation is strongly committed to broadcasting programs that reflect Australia's cultural diversity and contribute to a sense of national identity. The ABC places a premium on telling Australian stories in Australian voices, and is actively committed to fostering the arts in Australia. Consistent with its obligation to innovate, the ABC is also deeply committed to exploration of new and emerging media forms to ensure its continuing relevance to Australian audiences in coming years.

The ABC produces its own programming content, as well as commissioning and co-producing content for distribution through its television, radio and online platforms. In these activities the Corporation makes full use of Australian creative skills and technical expertise. The ABC believes in the importance of a vibrant independent production sector that can continue to be a source of co-production partners and high-quality Australian programming. Accordingly, the Corporation supports any action in relation to the AUSFTA that will continue to ensure an environment that encourages Australian cultural production.

Overall, the AUSFTA has little direct impact on the ABC. Consequently, the Corporation proposes to confine its comments to the single matter of the intended exclusion of public service entities from commitments in relation to cross-border trade in services.

The ABC understands that the one of the intentions in negotiating the AUSFTA was that the agreement would not restrict the ability of the Government to provide public services. To this end, it understands that the Government intended that public service entities, including the national broadcasters, be exempt from the provisions in Chapter 10 that prohibit the governments of Australia and the US from introducing measures that provide favourable conditions to their own nationals in relation to cross-border trade in services. The Department of Foreign Affairs and Trade's March 2004 *Guide to the Agreement* says as much when it notes that:

nothing in the Agreement affects the ability of either Party to provide public services, and subsidies and grants are explicitly excluded from the scope of the Chapter. Therefore, reservations are not required in Australia's schedules in relation to publicly provided

cultural activities, such as the public broadcasters (ABC and SBS), public libraries or archives. (p.48)

The ABC is concerned that the actual text of the Agreement may not exclude public broadcasters as intended.

Article 10.1(4)(e) states that Chapter 10 does not apply to “services supplied in the exercise of governmental authority within the territory of each respective Party.” A service supplied in the exercise of governmental authority is defined as “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”

The Agreement does not make clear, however, the sense of “competition” here. While the ABC does not compete with the commercial broadcasters for advertising contracts, it does operate in a highly competitive environment, particularly in respect of competition for both audiences and programs. Indeed, several Justices of the High Court of Australia made remarks to this effect in the matter of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63. For example, Gleeson CJ, in one of the majority judgements in that matter, stated that the ABC “is in the business of broadcasting. I accept that, although a public broadcaster, its position is not materially different from a commercial broadcaster with whom it competes” (p.15).

The ABC believes that the uncertainty created here marks a divergence between the intended effect of this part of the Agreement and its actual or potential consequences. While it is unable to identify immediate practical consequences of this divergence, the Corporation notes that the AUSFTA is expected to remain in force for decades. It is not possible to predict technological and other changes in the media environment over such a period, or the corresponding policy decisions that future Governments may make, including those of potential benefit to the ABC. Likewise, it is not possible to predict the challenges to those policies that might conceivably be mounted.

The ABC believes that it would be appropriate to amend the definition of “services supplied in the exercise of governmental authority” to clarify beyond doubt that public service broadcasters are exempt from the operations of Chapter 10, as intended.

The ABC has raised these matters separately with the Department of Communications, Information Technology and the Arts, and is seeking its guidance on the above issues.