Culture Research
Education and Training
Enterprise Australia
ABN 28 072 168 024

Suite 1, Level 6
45-56 Holt St
Surry Hills 2010

Tel: 02 8399 2655
Fax: 02 8399 2677

SUBMISSION

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

Culture Research
Education and Training
Enterprise Australia
ABN 28 072 168 024

Suite 1, Level 6
45-56 Holt St
Surry Hills 2010

Tel: 02 8399 2655
Fax: 02 8399 2677

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

Dear Mr Holmes

RE: THE AUSTRALIA – UNITED STATES FREE TRADE AGREEMENT

CREATE Australia appreciates the opportunity to submit its assessment of the effects of the Australia – United State Free Trade Agreement (AUSFTA).

CREATE Australia is a national peak organisation with 15 full members, 22 associate members and 11 industry members, representing the Vocational Education and Training skill development needs and interests of employees, employers and students in all the cultural sectors. These sectors include:

- film, television, video and radio
- multimedia
- design
- writing, publishing and journalism
- libraries
- performing arts
- entertainment and live theatre
- museums and galleries
- visual arts and crafts
- community cultural development
- music
- zoos and botanic gardens.

CREATE Australia is a source of information to its stakeholders, conducts research, is an advocate for creativity and innovation and is a manager of projects.

CREATE Australia does not believe itself competent to offer an opinion or to take a policy position on the merits of the AUSFTA as a whole. Its observations are entirely about the effects of the AUSFTA on the cultural sectors.

The arts, media and cultural industries are significant because they create and interpret the world and our national identity, and foster growth and are intrinsic to the development of community, national and personal values. Increasingly, the cultural products developed by cultural practitioners are underpinning the knowledge, creative and leisure economies around the world. These economies are incrementally replacing and enhancing manual and manufacturing industries in the global marketplace.

For this reason, CREATE Australia regards economic, political and lesiglative frameworks, such as the AUSFTA, which impact on the cultural sectors, as crucial to Australia's current well-being and to the economic future of our country.

In this submission CREATE Australia argues that the outcomes of the Australia US Free Trade Agreement have severely constrained the ability of this and future Australian governments to determine cultural policy, giving to the government of the USA a much stronger say in the determination of that policy.

CREATE Australia does not believe that the US Australia Free Trade agreement, by trading away our national sovereignty, is in the national interest.

Any free trade agreement Australia enters into should ensure that Australia remains free to respond to changes as and when it sees fit. This no longer appears to be the case.

The Australia - US Free Trade Agreement means that future generations will have access to fewer Australian stories. The majority of the stories that they will be able to access in the new media landscape will be written about other people and spoken in other accents. Primarily American.

The current negotiations have meant that the Government has traded away safeguards on cultural identity for tomorrow's Australians who will live and work with, be entertained and communicate by, new media and new technologies.

Australia's capacity to ensure an Australian identity in this new media landscape has been seriously compromised. It is clear is that the levels of Australian content in emerging media systems will be much lower than the current levels we have come to expect on broadcast television.

As already stated, CREATE Australia does not wish to make a judgement on the AUSFTA as a whole. It accepts that for some sectors the AUSFTA may bring an exchange of benefits.

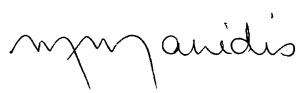
However, given the considerations, facts and arguments outlined below, CREATE Australia, based on advice from other cultural bodies and our own research, can reach no conclusion other than that the AUSFTA presents serious disadvantages to the cultural sectors. It cannot endorse this agreement. It does not believe that it would have the support of its constituency in offering sacrifices from the cultural sectors in order that other, possibly more financially resilient sectors, might benefit.

Indeed, a weakening of the cultural sectors represents a contraction of the national spirit and identity. It is the consequence we should least accept from any trade agreement. We seek an expansion of the national spirit.

CREATE Australia therefore does not have a basis upon which to offer support to the Australia – United States Free Trade Agreement. The arguments are broadened in Appendix 1, following this letter.

Thank you once again for the opportunity to offer comments on this important agreement.

Yours sincerely



Marie Manidis
CEO CREATE Australia
Wednesday, 12 May 2004

APPENDIX 1: REASONS FOR OPPOSING THE AUSFTA

Based on the Music Council of Australia's and the Australian Coalition for Cultural Diversity submissions opposing the AUSFTA, CREATE Australia, in support of these submissions, would like to list its objections to the proposed Australia-US Free Trade Agreement as follows:

The outcomes for Australian culture are almost entirely negative

Before negotiation of this AUSFTA, the Australian government's ability to intervene in support of Australian culture was unfettered. From the time of the ratification of the agreement, it will be seriously constrained. Some of the possible effects on Australian culture are clear, others have not been investigated and indeed are unforeseeable.

The effects of the agreement are not immediate

Inasmuch as the current regulations for old media are preserved in the AUSFTA, there will be no immediate consequence for culture one way or the other. The effects will manifest themselves into the future as the world changes and the government finds that its flexibility to respond is circumscribed.

This presents a challenge to parliamentarians. Since the effects will not be immediate, those making decisions now will not be accountable now.

The Australian Government acknowledged that *"Market forces alone are rarely sufficient to allow cultural organisations and individuals to be fully self-supporting. This is true for the cultural sector worldwide, but in Australia's demographic and geographic circumstances it is particularly the case… The important mix of subsidy, regulation and tax concessions …(is) a necessary subvention in the national interest to sustain Australian creative resources…"* (Australian Intervention on Negotiating Proposal on Audiovisual Services, CTS Special Session, Geneva, July 2001)

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

This was a policy supported whole-heartedly by the cultural sector. A lamb chop grown in Australia is much the same as a lamb chop grown in the USA. But the USA cannot create an Australian culture. Only we can do that. Given the realities of the market, aspects of our cultural production can only survive and thrive with government intervention. It is not appropriate that our efforts should be constrained by the trade ambitions of another country.

There is international support for the exemption of culture from trade agreements

There is widespread international support for the total cultural exemption. The International Network for Cultural Policy, a network of cultural ministers from more than 50 countries, made a proposal to UNESCO for an International Convention for Cultural Diversity, a standard-setting instrument which would serve to decide international cultural issues on cultural rather than trade criteria and offer some balance to the trade-orientated agenda of the WTO. UNESCO members have voted overwhelmingly to pursue formulation of such a convention – although with only lukewarm support from Australia despite the fact that at the time, paradoxically, Australia had practised the cultural exemption in its GATS offers and in its FTA with Singapore.

The European Union's cultural policies, and those of most of its member states, the policies of the Francophonie, of African states, most American countries north and south, seek to protect their own cultural prerogatives. The opponents, of which the USA is the most obvious, are few in number and generally are net cultural exporters. The US strategy is the aggressive assertion of its position through bilateral trade agreements, forcing concessions for itself in the cultural area to avert its threat of denial of benefits in other areas. This will create a set of precedents that weaken global support for the cultural exemption – for instance, as formulated by UNESCO. Australia is about to join the list of countries to accept unacceptable constraints on its cultural policy making, under pressure from the USA.

The proposed limitations on Australian music quotas for commercial radio are problematic

Based on advice from the Music Council of Australia, CREATE Australia argues as does the Music Council, that the consequences of the proposed limitations imposed by the AUSFTA are these:

- The government will lose its prerogative to increase the present Australian music quotas for commercial radio, whatever the arguments in its favour. It should be noted that other countries such as Canada and France have considerably higher quotas.
- The government will lose its prerogative to introduce any other regulations on radio broadcasting that might possibly have been adopted for the benefit of the Australian music sector and the national accounts. There are many other possible formulations – for instance, those operating successfully in other countries -- which might be beneficial here, but will be precluded regardless of merit.
- It might be observed that had the general cultural exemption applied, the effect of the provision in Annex II would have been only to cap the quota, leaving intact the government's prerogatives to introduce other forms of regulation.

The proposed changes for quotas be terminated or weakened are likely to mean that the broadcasters and possibly the major record companies would withdraw support for Australian product. Conversely, the position of Australian music would be strengthened if the quota requirements were (within reason) increased.

Australian music quotas for the community radio sector are not articulated

The reservation covering Australian music on radio does not include the community broadcasting sector, which currently is self-regulated along similar lines to the commercial sector. Because of its genuine commitment to Australian music, its broadcast of a great range of musical styles ignored by the commercial stations, and the exposure it gives to new artists, the community sector is extremely important to us.

An important purpose of government in regulating the broadcast sector to include Australian programming, whether of music or audiovisual, is to contribute to the reflection and development of "national identity and character, and cultural diversity". Commercial radio contributes very little to the reflection and development of cultural diversity; for that, we must depend upon the community and public broadcast sectors and their broadcasts of ethnic and multicultural music, classical music, jazz, folk, country and other styles, and experimental music.

If, as the negotiators have claimed, the community broadcasting sector will escape the terms of the AUSFTA because it is not-for-profit and will not be of interest to US interests, no action need be taken. However, we find no basis for this analysis and lacking confirmation, believe that the sector should have been included in Annex II along with the commercial sector.

Lacking a general cultural exemption, or its inclusion in Annex II, the government will have no right to regulate the community radio sector for Australian content.

There is no requirement for content of Australian Music on cable television

Requirements can continue to be imposed on cable television providers to spend a percentage of income on production of Australian content. Caps are placed on these percentage requirements: 20% for Australian drama, and 10% for a number of other categories such as children's programs. Music is not included, despite the existence of an Australian cable music channel and the actual or potential inclusion of music programs on other channels.

The government should have the prerogative to ensure inclusion of Australian music on channels that program music. However, unlike the situation in other genres where the broadcaster must by necessity take responsibility for production of content, some forms of popular music programming can utilise music content produced by the record companies (in the form of music videos). It may be feasible to have a music broadcast quota rather than an expenditure requirement, for so long as record companies continue to produce audiovisual content. It should be noted, however, that fashion, and music industry practices inevitably change and it may be that the music video goes out of style and is no longer produced. It is conceivable that at some point an expenditure requirement is more appropriate.

With passage of the AUSFTA in its present form, and the lack of a general cultural exemption, it will not be possible to regulate for Australian music content on cable television.

Comments on Music in audiovisual will be submitted in other documents

Since music is an element of most audiovisual productions, earning a significant proportion of total income for the sector from neigbouring rights, music participates in the effects of the AUSFTA on the audiovisual sector. These are being dealt with in detail in the submission from the Screen Producers' Association of Australia, the Australian Writers' Guild and the Australian Screen Directors' Association.

The definition of and provisions under Interactive media are problematic

To the extent that provision is made for Australian cultural content on new media, it comes under the rubric "interactive". There have been uncertainties about the definition of "interactive" in the new media sector. That could create a problem. There is also uncertainty about other aspects of the title. But it seems that the negotiators have assumed that all of new media will be captured under the title "interactive". This is a dangerous and probably incorrect assumption. E-cinema, for instance, is neither old media nor interactive. Much of the point of providing a reservation for new media must surely be to preserve the right to regulate media as yet unconceived. The government once agreed to this and we would ask why must they now be interactive to qualify?

Even overlooking matters of definition, the Annex II reservation for interactive media is flawed.

There is a requirement to invite "participation" by "any affected parties" in any preparations to change the regulations in interactive media. The US plainly would consider itself an affected party. The negotiators seem to want to obscure this by noting that the requirement will oblige consultation with domestic stakeholders. This is as it should be, although if that is the purpose, it does not seem necessary to make such a stipulation in an international trade agreement. The requirement to invite comment from the US is objectionable because in effect, it may translate into a *de facto* requirement for approval by the US.

Both Australia and the USA have to agree that Australian audiovisual content or genres thereof are not "readily available" to Australian consumers and that access is not

"unreasonably denied". This already invites major differences of opinion. Furthermore, the parties have to agree on *all* of the following: that measures to address such a situation are "based on objective criteria", are the "minimum necessary", are "not more trade restrictive than necessary", are not "unreasonably burdensome". Each of these requirements could be subject to radically different interpretation between two parties, one of which wants to defend its own culture and the other which wants to remove all obstructions to its access to the market.

Furthermore, it raises the question of what happens if, having consulted, the Australian government wishes to proceed with regulations with which the US has stated it is in disagreement. Is the knowledge that the US is capable of retaliating likely to inhibit the Australian government from placing Australian cultural interests first? Or are they to be constrained *a priori* by the US's view of its own trade priorities?

The non–specificity of E-commerce provisions cause concern

In the e-commerce area, the agreement applies specifically to cultural content except as Australia's rights are detailed in the Annexes. What are the implications for e-commerce activities not now specified in the Annexes? Again, e-cinema is such a genre.

In a number of discussions with the negotiators, negotiators were assured that cultural content would be protected in e-commerce by reservations in the Annexes; these would over-ride the stipulations in the e-commerce section. During all of those discussions, it was assumed that there would be a general cultural exemption which would simply remove all cultural content from the e-commerce liberalisation requirements. The purpose of the e-commerce section, negotiators were told, would be more to do with such issues as interoperability. But since there is no cultural exemption, all relevant cultural activities that are not named in the Annexes are subject to the e-commerce provisions. This becomes another area in which the future could bring difficulties and the government may lack the prerogatives to address them.

Senator Peter Cook has reported to representatives of the cultural sector at hearings of the Senate Foreign Affairs, Defence and Trade Committee that the US revealed during negotiation of the Uruguay Round its belief that the future of the audiovisual industry lies in the e-commerce area. It is in this area especially that it might have been expected to insist on full liberalisation. It is important to find the loopholes.

The lack of mention of Government organisations and qangos is a matter for concern

The negotiators did not think it was necessary to specify activities of the ABC, SBS and Film Australia as 'non conforming measures', but it is arguable that some, even a large part, of their present activities are provided in competition with private service suppliers and therefore not exempt. The same argument could be extended to other organisations or qangos, existing or to be created, that are active in the cultural area.

Government procurement restrictions appear to apply outside visual arts

In the government procurement section, there is a reservation allowing the government to purchase art works without applying national treatment. The implication is that procurement of cultural services or product outside the visual arts is subject to national treatment. This is a matter of some concern.

Intellectual property terms are not comprehensive

CREATE Australia generally does not object to the terms of the agreement in intellectual property. Especially, it supports the introduction of performers' copyright. On extension of term and some aspects of enforcement, there is mixed opinion.

Concerning performers' copyright, under the AUSFTA, this is provided in phonograms; however, it is specifically excluded for performances embodied in audiovisual works. This would include not only films, where the situation is relatively complex, but also in music videos. Chris Creswell from the Attorney-General's Department spoke at the February meeting of cultural representatives with the AUSFTA negotiators. He stated, as we understand it, that legal opinion in Australia held that since music videos utilise sound recordings exactly as released on CD, and then add the visual aspect, that performers' rights should apply to the videos as to the sound recordings. It appears, however, that this consideration has simply been bypassed by AUSFTA.

Similarly, the extension of copyright term has been considered at length in Australia, with recommendations failing to find sufficient merit to support it. Negotiators informed cultural representatives a number of times that the government would not support an extension of term. But despite this, in the AUSFTA there is provision for extension of term.

Regardless of the merit or demerit of the changes in IPR in AUSFTA, it was not the appropriate place to make these decisions. AUSFTA has displaced or forestalled a more democratic consideration of the issues within Australia and makes our position effectively irreversible regardless of success or failure of the measures, unless the US consents to change. The AUSFTA seems to change Australian law to match US law, possibly more for the benefit of the US than Australia.

The treatment of culture in the AUSFTA does not align with International Convention on Cultural Diversity

Prior to this AUSFTA, the government was in a position to support the proposed International Convention on Cultural Diversity, now being formulated in UNESCO, on the basis that it already practises what it would be preaching. This convention will provide an international basis for the exclusion of culture from free trade agreements. Our government's position with regard to the convention, should it have wished to support it, now is compromised. This, we believe, is an important aspect of the US agenda to weaken or defeat the Convention.

SUPPORTING DOCUMENTS – relating to Audiovisual media, provided by the ACCD Submission

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

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

In the lead up to the negotiation with the USA there were distinct differences between the two countries on the approach they took on the treatment of audiovisual in trade agreements. The position of the Australian government had been clear and unambiguous - not to liberalise and to retain complete flexibility to pursue cultural policy objectives in relation to the sector.

Australia did this in the Uruguay Round that led to the formation of the WTO and the General Agreement on Trade in Services (GATS) in 1995. Then Australia stood with the European Union and the majority of other countries in resisting the attempt of the USA to have the GATS constrain or remove the ability of countries to determine their cultural policy in relation to audiovisual.

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

> *"Australia remains committed to preserving our right to regulate audiovisual media to achieve our cultural and social objectives and to maintain the broad matrix of support measures for the audiovisual sector that underpin our cultural policy; including retaining the flexibility to introduce new measures in response to the rapidly changing nature of the sector."* [1]

As the negotiating process progressed Australia's position did not change from this.

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

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

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

> *motion picture and home video entertainment production and distribution services, radio and television production services, and sound recording services.*[2]

In other words the USA acknowledged current cultural measures but requested that WTO members make 'stand still' commitments, which would preserve these measures, but not allow countries to undertake further measures. That is the flexibility of members to implement cultural policy objectives would be constrained.

The structure of the GATS is such that countries must make formal commitments to subject various service sectors to the GATS disciplines. Despite the request of the USA, in making the announcement of Australia's offers on 1 April 2003 Minister Vaile said:

> *The Government will ensure that the outcomes of negotiations will not impair Australia's ability to deliver fundamental policy objectives in relation to social and cultural goals and to allow for screening of foreign investment proposals.*[3]

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

Australia took this stance further as it negotiated the Singapore Australia Free Trade Agreement (SAFTA). In this agreement, the audiovisual industry successfully argued for a broad cultural exemption to the application of the free trade principles, Australia defining culture broadly enough for it to apply to culture wherever it existed, across new, emerging and future technologies.[4] This exemption is a precedent in bilateral agreements and is much wider in its scope than the exemption for audiovisual industries included in the North American Free Trade Agreement (NAFTA) between the USA, Canada and Mexico.[5]

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

Australia and the USA positions in the AUSFTA

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

---

[2] US Trade Representative Press Release 1 July 2002, *US Proposals for*

Liberalising Trade in Services Executive Summary

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

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

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

Creative arts' was deemed to include:

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

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

> *Ensure that the negotiations take account of Australia's cultural and social policy objectives, and the need for appropriate regulation and support measures to achieve these objectives in areas such as audiovisual media.* [6]

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

> *The Government remains committed to preserving its ability to regulate in relation to social and cultural objectives, and will ensure the FTA is consistent with that goal."*[7]

The objective of the US was more generally expressed as the desire to '*Pursue disciplines to address discriminatory and other barriers to trade in Australia's services market.*'[8]

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

A number of statements were also made reassuring Australia that existing local content regulations were not within the sights of the US. Ralph Ives, chief negotiator for the US, was quoted as saying "We have absolutely no intention of eliminating the local content rules for TV broadcasting."[9] And while this did not rule out the introduction of "standstill" arrangements, the central issue for the audiovisual sector was how the agreement would affect Australia's ability to regulate local content in emerging digital services such as video-on-demand, e-cinema, interactive television.

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

> *What the Government seeks is an agreement that will result in real economic benefits for Australia, but that does not hinder our capacity to continue to tell Australian stories, in Australian voices, to Australian and overseas audiences….*
>
> *The Government will ensure that the outcomes of the USFTA do not undermine Australia's capacity to regulate to meet our cultural policy objectives.* [10]

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

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

---

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

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

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

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

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

What the agreement says

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

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

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

- *The Government has protected our right to ensure local content on Australian media, and retains the capacity to regulate new and emerging media, including digital and interactive TV.*

- *The agreement ensures that there can be Australian voices and stories on audiovisual and broadcasting services, now and in the future.* [11]

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

Australian Content on Commercial Television

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

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

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

However, Article 10.6.1(c) and Article 11.13.1 (c) mean that any amendments to these non-conforming measures must be "*to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment…"* In other words

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

the regulation cannot be increased beyond current levels and these 'ratchet provisions' mean any future change must be to wind it back.

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

The ABA last reviewed the standard publicly in 2001-02. When that review was undertaken it was not done with the prospect that it would be the last opportunity Australia would have to increase the level of Australian content required of commercial broadcasters. The review focused mainly on changes to the sub-quotas for drama, documentaries and children's programs and little attention was given to setting the overall benchmark of Australian content at a higher level. In part this probably had to do with the fact that the transmission quota was only increased to 55% during the nineties having been first set at 40% and increased to 50% in 1970.

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

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

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

> *The United States continues to oppose discriminatory broadcast quotas and maintains that market forces best determine programming allocations.*[12]

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

> *If enacted, the FTA would improve market access for U.S. films and television programs over a variety of media, including cable, satellite, and the Internet.*[13]

Subscription Television

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

---

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

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

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

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

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

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

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

The caps on expenditures on Australian adult drama (20%) and children's, documentary, arts and education channels (10%), will be the lowest in the developed world (see Appendix 3) and take no account of the future potential of the digital Pay TV platform in this country, particularly as the television market fragments with digital take-up. They also distort the actual levels of local programming because they do not equate to transmission hours. We have verified that the current 10% Australian drama spend requirement only amounts to 3.8% of total transmission time.

We are also concerned that the AUSFTA caps only match the industry's recommendations to the ABA's Review of Australian Content on Subscription Television (February 2003), which we considered modest to reflect the still emerging economics of the Pay TV industry in this country.

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

Free to air multi-channelled commercial television

Here again the Government has taken the opportunity of the free trade agreement to flag what appears to us to have been a poorly-thought through policy option for commercial television.

In Annex 2-6 (a) provision is made for the imposition of a transmission quota not exceeding 55% and sub-quotas for particular program formats *'where more than one channel is made available by a service provider'*. These quotas cannot be imposed on more than two channels or 20% of the total number of channels. We understand this to mean that if the commercial broadcasters were allowed to use their current digital capacity to multi-channel then an additional two of these digital channels could have the same Australian content requirements as the existing analogue channels.

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

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

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

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

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

New media

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

In a report published by the AFC last year, *Flexible Visions: A snapshot of emerging audiovisual technologies and services and options for supporting Australian content*[14] 18 new technologies or services were examined. The AFC found that out of the 18 new technologies and emerging services:

> *...nine of these have been introduced into the Australian market, while six others are planned to be introduced in the next two to three years. Australia currently regulates two of these new technologies for content – digital subscription television and advertising – due to the ease of regulatory transference into the digital realm.*[15]

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

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

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

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

We are also extremely disappointed about the pre-conditions for future action by the Australian government. Annex 2-7(f) provides that Australia can only act to ensure Australian content on these services is *'not unreasonably denied'* to Australians and can only do so after making a finding *'that Australian audiovisual content or genres thereof is not readily available to Australian consumers…'*

There are thus two tests to be met before the Australian government can act. It is not enough that there be a finding that Australian content on any of these services is not available to Australians, but it must also be established that the absence of such content is because of some unreasonable denial. But what exactly does this mean? How low does the level of Australian content need to be before it is being unreasonably denied? What circumstances will be considered unreasonable? Can it be applied to the overall level or to certain genres of programming?

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

---

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

[15] Ibid, p.5

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

> *to accommodate uncertainties relating to technological change in this sector, Australia preserved its ability to take some new measures to assure continued availability of Australian content to Australian consumers, but will have to take US trade interests into consideration in designing any such new measures.*[16]

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

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

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

We are very concerned that in practice this test for regulatory action may be hard to meet and difficult to have effect in a globalised system of content distribution.

Film and television co-productions

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

Grants, Subsidies and tax concessions for Audiovisual production

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

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

A problem arises in the case of the Investment chapter where only Articles 11.3 (National Treatment), 11.4 (Most-Favoured-Nation Treatment), and 11.10 (Senior Management and

---

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

Boards of Directors) do not apply to subsidies and grants. This means that Article 11.9, which deals with performance requirements does apply. Article 11.9.2(a) would prevent Australia imposing as a condition of a grant or subsidy a performance requirement *'to achieve a given level or percentage of domestic content'*. That is, a condition of a grant or a subsidy for audiovisual production cannot be that the production will meet minimum standards of Australian content, such as being produced, written and directed in Australia. Although, Article 11.9.3(a) would still seem to allow the imposition of a performance condition that it be made in Australia.

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

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

Investment by Government in Audiovisual Production

The principle means of direct support for audiovisual production is provided through direct investment by agencies such as the FFC and the AFC. The largest portion of direct assistance to the sector is through the FFC, which co-invests with the private sector in the intellectual property that is new Australian feature films, television drama and documentaries.

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

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

ABC and SBS Services

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

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

The effect of this is that it leaves the Australian government exposed to arguments from the US that, at least the commercial activities of the national broadcasters, are not consistent with the terms of the agreement. For example, does the Australian government want to have an

argument with the US that the news service provided on line by the ABC is in competition with that being provided by CNN or Microsoft?

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

Electronic Commerce

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

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

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

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

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

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

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

While this appears to give some comfort on audio-visual the definition of 'digital products' contained in the e-commerce chapter is wider than the undefined 'interactive audio and/or video services' referred to in Annex 2. We are forced to ask why one would use the term 'interactive audio and/or video services' in the Annex, if one did not intend it to have a different, and potentially more restrictive meaning, than 'digital products'? This raises the prospect of future arguments over what should be bound by the e-commerce chapter and what action Australia might be able to take under the scope of the non-conforming measures in Annex 2.

Intellectual Property

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

Consultation

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

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

> *DFAT and the Department of Communications, IT and the Arts also held regular meetings with representatives of the cultural and audiovisual industries on the treatment of culture and audiovisual services in the negotiations.* [17]

We agree there were regular meetings but this gives the impression that the sector was in agreement with the outcome. The NIA does not state that the outcome of the negotiation was far from the result being sought by the sector, that we are not happy with the result and that there was no consultation with the sector when the government changed its negotiating position from seeking an exemption for culture in general to one where it submitted to stand still and limited reservations. We are of the view that this change in the position of the government came after our last formal meeting with the negotiators in December 2003.

Approval of the agreement

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

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

The role of the Parliament in reviewing trade agreements is relatively recent. The Joint Standing Committee on Treaties was established in 1996 and is charged by the Parliament

---

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

with the role of reviewing treaties before the government takes any action that would bind Australia in international law. While this provides a welcome opportunity for the consideration of the implications of any treaty for the nation it is by no means clear that the Parliament has the power to restrain the government from taking such action that would bind Australia in international law.

Compare this with the situation in the USA. There the power of the President of the USA to negotiate an agreement stems from Congress. Under the Trade Act of 1974 and subsequent amendments the President needs to seek from the Congress authority to enter into negotiations on both multilateral and bilateral trade agreements. The current Trade Promotion Authority was renewed by the Congress in 2002 having lapsed in 1994. Once negotiations are concluded the President needs to submit the concluded text to the Congress for ratification. The Congress may only ratify or reject the submitted text, it cannot amend it.

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

These include the Advisory Committee on Trade Policy and Negotiations (ACTPN), which is the senior advisory committee, the Intergovernmental Policy Advisory Committee, the Trade Advisory Committee on Africa, the Agricultural Policy Advisory Committee, the Labor Advisory Committee, the Defense Policy Advisory Committee, and Trade and Environment Policy Advisory Committee. In addition there are four Industry Functional Advisory Committees and seventeen Industry Sector Advisory Committees.

Under the Trade Act the ACTPN and each appropriate advisory committee must provide the President and the Congress with '*..an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives*' set forth in the applicable trade legislation.[18]

According to the USTR the advisory system operates so that *'during the course of negotiations, advisors review confidential texts and are asked to provide advice and input'*, they receive *'more frequent briefings during the concluding phases of trade negotiations'* and are provided with *'a secure website for review of documents'*.[19] This would suggest that during the negotiations with Australia, the representatives of the audiovisual sector in the US were privy to the negotiating positions and documentation of the Australian government and were probably consulted on the final nature of the concluded deal as it was being done.

Thus, unlike Australia, the elected representatives are the foundation of all power to enter into trade agreements and the Congress has legislated to ensure that not only trade policy, but also the actual conduct of negotiations themselves, is conducted under a formal and

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

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

mandatory process of detailed consultation with all sectors of the community and the economy.

Australia's Audiovisual Trade with the USA

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

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

Australia's largest export markets for audiovisual are in New Zealand and in Europe, mainly the UK and Germany.

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

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

APPENDIX 2

Current Australian Government Cultural Policy Objectives For Audiovisual

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

A. Regulation

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

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

B. Grants, Subsidies and Investment

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

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

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

C. Tax Concessions

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

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

D. Other measures

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

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

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

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

APPENDIX 3

A. International Subscription Television Regulations

	LOCAL CONTENT REQUIREMENTS
Country	***Subscription Television regulated local content broadcast time***
Canada	***Cable, Satellite and Subscription services*** >50 per cent of Canadian subscription services provided must be Canadian. 5 per cent gross annual revenues to Canadian content On top of these, the CRTC also sets minimum Canadian content and spending levels on an individual service basis. Examples include: • 100 per cent Canadian content transmission quota on CTV Newsnet • 25-30 per cent Canadian content transmission quota on The Movie Network and Movie Central. • 71 per cent of gross annual revenues for the Life network ***New digital subscription services*** *Category 1 services:* • 5 per cent gross annual revenues to Canadian content • 50 per cent Canadian transmission quota *Category 2 Services:* • 35 per cent Canadian content (English- and French-language specialty services) • 15 per cent Canadian content (Canadian content) • 30 per cent Canadian Content (music video services)
France	60 per cent European works. 40 per cent original French-language programmes.
Germany	>50 per cent European works. 10 per cent independent productions.
Greece	>50 per cent European works.
Korea	>50 per cent Korean works. Individual quotas apply for film, animation and popular song genres.
Mexico	80 per cent Spanish language (originally produced, sub-titled or dubbed). 7-8 per cent Mexican works (on advertising supported services)
Netherlands	>50 per cent European works. >40 per cent Dutch or Frisian works.
South Africa	5 per cent local television content within particular categories (private subscription television service providers) 20 per cent South African content for unencoded (public) portions of service.
Spain	>50 per cent European works. 10 per cent independent productions.

	LOCAL CONTENT REQUIREMENTS
Country	***Subscription Television regulated local content broadcast time***
Sweden	>50 per cent European works. 10 per cent independent European productions or 10 per cent programming budget on works produced by independent European producers.
United Kingdom	10 per cent UK Independent productions (in specific categories) 86 per cent EU material (ITV)

B. Australian subscription television regulations

Australian Local Content Regulations for Subscription Television	
Pre-AUSFTA	10 per cent of annual programme expenditure for Australian drama
Industry Drama Recommendations 2002-03	20 per cent annual programme expenditure for Australian drama: SPAA, AFC, FFC, ASDA, AWG 75 per cent independent production quota: SPAA and FFC
Industry Documentary Recommendations 2002-03	20 per cent documentary expenditure requirement: AFC, AWG, SBS SPAA/ASDA Documentary Council … half the amount on new programs: Film Australia … yielding 10-20 hours: FFC … and a transmission quota of 20-52 hours: MEAA
Industry – Other Recommendations 2002-03	80 per cent for television commercials: SPAA, AWG, ASDA, MEAA, FFC. 20-30 per cent expenditure requirement for children's channels: AWG, MEAA, ASDA. Content standard for music channels: AWG, MEAA and ASDA.
AUSFTA subscription television regulatory limits	***Drama:*** up to 20 per cent expenditure requirement ***Documentary:*** up to 10 per cent expenditure requirement. ***The arts:*** up to 10 per cent expenditure requirement. ***Children's:*** up to 10 per cent expenditure requirement. ***Educational:*** up to 10 per cent expenditure requirement.