

**SUBMISSIONS TO THE SENATE SELECT COMMITTEE ON THE
AUSTRALIA - UNITED STATES OF AMERICA FREE TRADE AGREEMENT
IN RELATION TO THE AUDIOVISUAL SECTOR**

OVERVIEW:

The provisions of the Australia - United States of America Free Trade Agreement (AUSFTA) that apply to the cultural and audiovisual sectors of the Australian community are not in the national interest of Australia in their present form and should not be supported by the Australian Parliament.

The AUSFTA, as presently drafted, severely diminishes the Australian government's ability to determine cultural policy within the audiovisual sector in the future. The agreement limits Australian content on commercial television, accepts lower levels of local content on subscription television, and allows the US to intervene in the determination of Australian content in all new or emerging media services.

This submission recommends that rather than accepting the AUSFTA in its present form, Australia should: (1) exclude all cultural industries from this and all future trade agreements (as it did in the Singapore-Australia Free Trade Agreement) by way of a comprehensive Cultural Reservation; (2) negotiate through the World Trade Organisation (WTO) a new international Multilateral Cultural Treaty that acknowledges the legitimate role of domestic cultural policies in ensuring cultural diversity; (3) pursue Multilateral and Regional Trade Treaties that provide fairer access to international trade while preserving domestic cultural policy and diversity.

RECOMMENDATIONS:

- 1. Cultural Reservation in the AUSFTA**
- 2. Multilateral Cultural Treaty**
- 3. Multilateral and Regional Trade Treaties within the WTO**

1. Provisions of the AUSFTA (extracted from DFAT website):

The AUSFTA consists of 23 Chapters, 4 Annexes, and 27 side letters. The provisions that affect the broad cultural sector of Australia are: Chapter 10 on Cross-Border Trade in Services (CBTS), Chapter 11 on Investment, Chapter 16 on Electronic Commerce and Chapter 17 on Intellectual Property.

The outcome on the audiovisual sector takes the form of three reservations to the AUSFTA's Chapter 10 on CBTS and Chapter 11 on Investment. These reservations, included in two Annexes to the Agreement, allow Australia to maintain or adopt measures that are inconsistent with certain obligations of the CBTS and Investment Chapters (ie. "non-conforming measures"):

- Annex I can be used to reserve the right to maintain existing non-conforming measures that are specifically identified in that Annex.
- Annex II can be used to identify certain sectors, sub-sectors or activities where a Party reserves the right to maintain existing non-conforming measures, to make these measures more restrictive, or to introduce new non-conforming measures.

The three reservations addressing the use of local content requirements in the audiovisual sector are:

- (i) An Annex I reservation allowing Australia to maintain the existing 55% local content transmission quota on programming, and the 80% transmission quota on advertising, on free-to-air commercial TV on analogue and digital (other than multichannelling) platforms.

Subquotas for particular program formats (ie. drama, documentary etc) may also be applied within the 55% programming quota.

(ii) A general Annex II reservation allowing Australia to both maintain existing and introduce new measures in relation to:

- (a) Multichannelled free-to-air commercial TV - A 55% transmission quota on programming may be imposed on no more than 2 channels, or 20% of the total number of channels (whichever is greater), made available by an individual broadcaster. The quota cannot be imposed on more than three channels of any individual broadcaster. Subquotas may be applied within the 55% quota in a manner consistent with existing standards.

An 80% transmission quota on advertising may be imposed on no more than three channels made available by an individual broadcaster.

(The Australian Government will consider the issue of whether to introduce free-to-air commercial TV digital multichannelling in the context of the review required under Schedule 4 to the Broadcasting Services Act to be conducted this year.)

- (b) Subscription TV - Expenditure requirements of up to 10% of program expenditure may be imposed on services providers making available services in the following formats: the arts, children's, documentary, drama, and educational. The expenditure requirement on drama channels may be increased up to 20% upon a finding by the Australian Government that the 10% requirement is insufficient to meet its stated goal for such expenditure. This finding will be made through a transparent process including consultations with affected parties including the US. The increase shall be non-discriminatory and no more burdensome than necessary.
- (c) Free-to-air commercial radio broadcasting - transmission quotas for local content of up to 25% can be imposed on individual stations.
- (d) Interactive audio and/or video services - Measures can be imposed to ensure that Australian content on such services is not unreasonably denied to Australian consumers, upon a finding by the Australian Government that Australian content is not readily available to consumers through such services.

Any measures adopted will be implemented through a transparent process permitting participation by affected parties, be based on objective criteria, be the minimum necessary, be no more trade restrictive than necessary, and be applied only to enterprises carrying on a business in Australia.

- (e) Broadcasting planning, licensing and spectrum management.
- (f) Taxation concessions for investment in Australian cultural activity, film and television production where eligibility for the concession is subject to local content or production requirement.

(iii) An Annex II reservation allowing Australia to both maintain the existing co-production arrangements with other countries and to introduce new ones.

2. Effects of the AUSFTA on Australia:

2.1 Audiovisual Industries in Australia and the United States -

According to the Australian Film Commission (AFC) report on "*Australia's Audiovisual Industries and Cultural Policies*" (September 2003), compared to the US, Australia's audiovisual industry is a very small industry with a small market. Our population of nearly 20 million is 15 times less than the US with 300 million people. We have about 7 million homes with TV sets, the US has 106 million. We have 1,900 cinema screens, they have 35,000. Cinema Box Office receipts in Australia in the last 5 years were US\$2.39 billion, and in the US they were US\$38.7 billion. Over the past 5 years Australia has produced on average 34 feature films per year worth about US\$100 million, while in the same period the US has produced an average of 656 feature films per year worth about US\$10.8 billion.

Australia has 28 commercial free-to-air television stations affiliated with 3 networks; 2 national public broadcasters; and 5 subscription TV operators offering up to 56 channels. In the US there are more than 1,500 TV stations, most of which are affiliated with 5 major networks, and 9,000 cable TV systems.

Contrary to a myth perpetuated by the Motion Picture Association of America (MPA) which is a powerful American industry lobby that represents the Hollywood studios, Australia is the most open market for films and television programs in the world. In the period from September 2002 to April 2003, 76% of all new programs shown on Australian TV were foreign, dominated by the US, which provides more than 65% of our audiovisual import trade. By comparison, France had 33% foreign TV programs, Germany and the UK 9%, and the US the lowest of all with 4%.

Cinema distribution and exhibition is even more heavily weighted in the US's favour. US films have taken an average 96 % share of the US box office over the past five years, with Australian films taking a tiny 0.18 per cent. In Australia, US films claimed 83 per cent of the box office over the same period, with the Australian film's share at 6 per cent.

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

- **Direct subsidy** through the Australian Film Commission, the Film Finance Corporation Australia, Film Australia, the Australian Children's Television Foundation (around US\$57 million per year) and state film agencies (around US\$16 million per year);
- **Taxation arrangements** for investment in feature films, television miniseries and documentaries;
- **Australian content rules** for free-to-air commercial television, pay television and television advertising;
- regulation of temporary entry of non-Australian residents into the Australian entertainment industry;
- international co-production arrangements;
- rules governing foreign ownership of media and cross-media ownership;
- funding of two national broadcasters: the Australian Broadcasting Corporation and the Special Broadcasting Service;
- Direct support for training through the Australian Film, Television and Radio School; and
- Funding of the national film and sound archive.

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

As these figures demonstrate, Australian feature films and television dramas are usually produced with substantial private investment. The balance between government and private finance has evolved over decades of cultural support, and works to overcome the problems of market scale and critical mass. With a population of less than 20 million, Australia does not have the market from which local producers can recover their costs and they must rely on additional export revenues.

By contrast, US producers can recover all their costs in the US and sell into Australia at a fraction of the original production cost. For example, a US television series costing between US\$1-2 million per hour, fully financed out of the US market, can be sold to an Australian broadcaster for US\$20,000 to US \$85,000 per hour. An Australian series costing about US\$320,000 an hour might be pre-sold to an Australian broadcaster for half that amount and deficit-funded against potential overseas sales by the Australian production company using a combination of public and private finance.

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

2.2 Australian Content -

The Australian government claims that the USFTA protects Australian content and culture. In reality, there are strict limits on future governments' ability to ensure that Australian voices continue to be heard on Australian audiovisual services.

2.2.1 Australian Content on Commercial Television

Under Annex I, Australia's existing local content quotas for commercial television are 'bound' or kept at a 'standstill' level that can not be increased, and if they are reduced in the future they cannot later be restored to existing levels. There is a 'ratchet effect' which means that if an existing law or policy is made less regulatory, it must remain at that lower level and cannot be changed back by a future government. Further, the US government can challenge any new regulations on the grounds that they are trade restrictive or too burdensome for US business. This is a significant restriction on Australian democracy, restricting our ability to determine our own levels of local content and development of the local audiovisual industry.

Australia's transmission quota for commercial television is presently at least 55 per cent of annual hours broadcast by a broadcast licensee between 6am and midnight must be Australian: this must include:

- 1-4 hours of first-release adult drama per week (in prime time);
- 15 minutes of first-release documentary per week; and
- 2.5 hours of first-release children's programming per week.

By comparison, Canada has a quota of a minimum of 60% Canadian content, the European Union states that a "majority" of broadcasting time devoted to fictional programs must be of EU origin, and France has ruled that 60% of its programming must be European and 40% French. These levels are not high compared to some other developed nation's levels of domestic content. Certainly the Australian level is far below the level of local content on US (90%) and UK (80%) TV.

The Canadian government's Cultural Industries Sectoral Advisory Group on International Trade (SAGIT) stated in its 1999 report *'New Strategies for Culture and Trade - Canadian Culture in a Global World'*:

"Of all our cultural policy tools, the regulation of Canadian content has had the most significant impact. The regulatory framework for the broadcasting industry has proven to be extremely effective in supporting Canadian cultural industries while respecting foreign interests. The industry attributes the increase in viewing of Canadian English-speaking television programs and the strength of Canada's sound recording industry to the Canadian content rules."

The 'ratchet provisions' of the AUSFTA mean that this Australian government has decided that future generations are prevented from ever encouraging greater levels of Australian content on our television screens.

2.2.2 Multichannelled Free-to-Air Commercial Television Broadcasting Services

Under Annex II of the AUSFTA, future Australian governments are supposed to be allowed to make laws in respect of new multichannelled free-to-air commercial TV broadcasting services, but in reality Australia is severely limited in the scope of the content regulations that we can introduce. Although multichannelling has not been introduced in Australia yet, it is being considered by the government later this year in the context of the review required under Schedule 4 to the Broadcasting Services Act and almost certainly will recommend the introduction of multichannelling for digital free-to-air commercial TV broadcasters.

A 55% transmission quota on programming may be imposed on no more than 2 channels, or 20% of the total number of channels (whichever is greater), made available by an individual broadcaster. The quota cannot be imposed on more than three channels of any individual broadcaster. Therefore, as stated by Professor Ross Buckley of Bond University, if a service provider broadcasts 5 channels as present technology allows, then 3 of the channels will not be subject to local content rules. When technology improves, and a service provider broadcasts 15 channels, then 12 channels will not be subject to local content rules. In the above example (5 channels) the net effect is to reduce the existing local content percentage from 55% to 22%.

There is no requirement for the local content to be of any particular mix of programming including drama, documentaries, or children's programs, and many within the industry fear that content requirements could be satisfied with one genre of programming – such as sport or reality television. In any event, the Government has effectively announced a significant cultural policy by means of a trade agreement without any public debate or discussion with the community, parliament or industry on the implications of that policy on Australia. Unless the AUSFTA is rescinded, the government has locked future generations into very low Australian content requirements on new multichannel television services.

2.2.3 Australian Content on Subscription Television

Under Annex II, the expenditure requirement on Australian content for subscription television is limited to 10% of total program expenditure (which can rise to 20% for drama channels, but only on conditions that allow the US to challenge). This means that a cap of 10% will apply to children's, documentary, arts and educational programs. Drama expenditure can only be increased to 20% "*upon a finding by the Australian Government that the 10% requirement is insufficient to meet its stated goal for such expenditure. This finding will be made through a transparent process including consultations with affected parties including the US. The increase shall be non-discriminatory and no more burdensome than necessary.*" The mandatory requirement to consult with the US government and US film and TV producers is an unnecessary additional constraint upon Australia's sovereign right to determine its own cultural policy.

Also, any increase in the Australian drama expenditure requirement is by its nature 'discriminatory' and 'burdensome' to US producers, and therefore the US would be able to challenge the increase on prescribed trade law grounds under the Dispute Process (Article 21 AUSFTA), which does not take account of social policies when resolving trade disputes.

Even at 20% expenditure for drama and 10% for children's, documentary, arts and educational programs this is the lowest quotas in the developed world. Canada has a mixture of local content requirements on subscription television that varies from 16 to 100% of transmission time to be local programming depending on the nature of the service (with an average of 35%) plus 5% of gross revenues to be spent on Canadian programs. France requires 60% of programs to be European and 40% French language. The UK, Germany, Greece, Netherlands, Spain and Sweden require 50% of programs to be European.

Also, the AUSFTA locks in the 'expenditure' model as the only way to intervene in subscription television, when such expenditure does not necessarily equate to transmission hours. For example in Australia the 10% expenditure requirement only amounts to 3.8% of total transmission time. The expenditure model was imposed by the government because the subscription television industry was new and struggling at the time. But with the increased take up and future potential of digital platforms and changes in technology, the industry is set to thrive. Therefore a policy shift to a mix of content rules and revenue expenditure (like Canada) would have been wise, but is now lost under the AUSFTA, and the availability of Australian children's, documentary, arts and educational programs will be stuck around 4%.

2.2.4 Free-To-Air Commercial Radio Broadcasting

Free-to-air commercial radio broadcasting Australian content is capped at 25%, which is the present limit for pop/rock music under Code 4 of the Commercial Radio Code of Practice. By way of comparison, in France all private and public radio stations must devote 40% of prime air time to French musical works. The Australian government has traded away future government's right to set Australian content limits above the modest 25% mark.

2.2.5 Interactive Audio and/or Video Services

Under Annex II, future Australian governments are limited in the laws they can introduce for new media. There are more restrictions on interactive audio and/or video services, since the Australian government must first prove that Australian content is not readily available to consumers. Any rules must be applied transparently and be no more trade restrictive than necessary, and can be challenged by the US. These restrictions severely limit the capacity of future governments to respond to new circumstances and provide rules for Australian content on those new forms of media.

The AFC published a report in November 2003, *'Flexible Visions: A Snapshot of Emerging Audiovisual Technologies and Services and Options for Supporting Australian Content'*, that listed 18 emerging technologies and services, which included: Broadband websites, Datacasting, Digital Film distribution, Digital film exhibition, Digital Subscription television, DVD/Video Hire and Sale, High Definition Television (HDTV), Interactive Television, Electronic Program Guides, Free-to-air multichannelling, Personal Video Recorders, Narrowband Internet Content, Internet TV, Peer-to-peer networks, Satellite, T-commerce/Interactive advertising, 3G cellular mobile services, and Video on Demand. Of the 18 services, 9 had been introduced into the Australian market, 6 others are planned to be introduced in the next few years. Australia only regulates 2 of the technologies for local content – digital subscription television (excluding narrowcasting) and advertising – but out of the 18 only 3 (3rd Generation (3G) phones, digital film distribution, and peer-to-peer networks) are not regulated for local content anywhere in the world.

Therefore given the rapid changes in audiovisual production and delivery technologies, it was imperative that the Australian government retained the right to regulate for Australian content in the future.

Unfortunately Annex II of the AUSFTA applies several pre-conditions to regulation such that Australia can only ensure Australian content on these services “*is not unreasonably denied to Australian consumers, upon a finding by the Australian Government that Australian content is not readily available to consumers through such services.*” This pre-condition is a negative covenant that does not provide for minimum levels of Australian content, but just that such content is being *unreasonably denied to Australians*. It could be that the level of content is low overall and in certain genres, but still not unreasonably denied.

The next pre-condition to regulation of emerging media is that: “*Any measures adopted will be implemented through a transparent process permitting participation by affected parties, be based on objective criteria, be the minimum necessary, be no more trade restrictive than necessary...*”. As is the case with increasing Subscription television content, the Australian government will need to satisfy the US government and US audiovisual services industry before it could apply content quotas and they would most probably be very minimal to satisfy such parties. Failing that the dispute settlement process could be invoked (Article 21) and decided on prescribed trade laws alone, and not cultural policies.

The third pre-condition is that any content rules may “*be applied only to enterprises carrying on a business in Australia*” which means that foreign businesses could deliver digitised content into Australia without being subject to any local content requirements.

Australia’s ability to regulate local cultural content on new and emerging media and technological services as yet unknown should be unfettered and not given away in bilateral trading agreements. This also poses a threat to the development of the emerging technology industry in Australia, because it will be at a economic disadvantage compared to the size and advancement of the US technology industry, and therefore this has the potential to thwart the new economy in this country.

2.3 Public broadcasting –

As public broadcasting is not listed in either of the Annexes, it is not excluded from the agreement. The funding of public broadcasting is protected by the general exclusion of subsidies and grants (Article 10.1). However the regulation of public broadcasting could be affected by the agreement because the definition of public services excludes services provided on a commercial basis or in competition with other service providers. SBS advertising time or ABC product marketing and distribution may not be excluded by this definition. This ambiguity may mean that the US could challenge some regulation of public broadcasting, claiming it is inconsistent with the AUSFTA.

2.4 Grants, Subsidies and tax concessions for audiovisual production –

Tax concessions for investment in Australian production are excluded under Annex II. Grants and subsidies for production are generally excluded from the agreement, because traditionally the US provides grants and subsidies to its domestic industries to drive down the price of US exports to allow them to be dumped on foreign countries at prices lower than the foreign entities can produce the same products. However a grant or subsidy may not have a performance requirement such as ‘*to achieve a given level or percentage of domestic content*’. This could affect the various federal and state subsidy and grant programs to encourage production of audiovisual material with certain levels of Australian content, or to be made in particular states and territories.

2.5 Investment by government in audiovisual production –

The AFC and the Film Finance Corporation of Australia (FFC) invest directly in Australian film and television programs in return for a share of the intellectual property rights in the project. Because these agencies and programs are not excluded under the AUSFTA, and the definition of investment specifically includes intellectual property rights in Article 11.17, the FFC and AFC will not be able to discriminate in favour of ‘qualifying Australian films’ that meet the ‘significant Australian content’ test. A US producer could challenge the FFC or AFC investment on the basis that it discriminates against the US producer seeking to access investment.

2.6 Extension of Copyright term

Although these submissions do not seek to deal extensively with all the effects on Australia of the extension of the copyright term from the present 50 years after the life of the author to 70 years in line with US law, in relation to audiovisual products it will deny producers the right to access products that would have otherwise entered the public domain. The extension to 70 years was enacted by the US to protect the interests of the Hollywood studios in films that were about to go into the public domain. This will also be costly for libraries and educational bodies, as Australia has adopted the US copyright standard without the US's more generous ‘fair use’ rules for copying for research and education purposes. Copyright law is supposed to provide a balance between fair rewards for authors and excessive protection that raises prices. The Australian Intellectual Property and Competition Review Committee recommended that copyright not be extended without a public inquiry.

3. Cultural Reservation:

The only way Australia can ensure the protection and enhancement of our unique culture without restricting market access to Australia for US audiovisual products and services is to apply a broad Cultural Reservation which excludes cultural goods and services from the operation of the AUSFTA.

Many bilateral and regional agreements in the past have sought to exclude cultural industries from trade agreements. The Canada-USA Free Trade Agreement of 1988 and the North American Free Trade Agreement of 1994 (NAFTA) both exclude ‘cultural industries’ at the insistence of Canada. However, the definition of ‘cultural industries’ is too narrow and there is provision within NAFTA for the US to take retaliatory and compensatory trade measures for any acts by Canada pursuant to the exemption.

The cultural reservation that Australia recently negotiated into the Singapore-Australia Free Trade Agreement (SAFTA) provides a good model for the treatment of culture in trade agreements. This reservation preserved 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; broadcasting and audiovisual services, including measures relating to planning, licensing and spectrum management, and including services offered in Australia, and international services originating from Australia.

Creative arts include: the performing arts – including theatre, dance and music – visual arts and craft, literature, film, television, video, radio, creative online content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrids art works which use new technologies to transcend artform divisions.

This Cultural Reservation allows Australia to preserve its ability to regulate in relation to social and cultural objectives and does not materially damage the commercial trading interests of the US that already dominate market share of Audiovisual products and services in this country.

4. Multilateral Cultural Treaty

Another approach to trade agreements and cultural policy would be to adopt a proposal of the Canadian Cultural Industries Sectoral Advisory Group on International Trade (SAGIT) to propose a new strategy that would involve negotiating a new international instrument that would specifically address cultural diversity, and acknowledge the legitimate role of domestic cultural policies in ensuring cultural diversity. We refer to this as a Multilateral Cultural Treaty to be negotiated under the authority of the WTO. Just as nations have come together to protect and promote environmental bio-diversity, it is time for them to come together to promote cultural and linguistic diversity. SAGIT recommends that a new international instrument/treaty on cultural diversity would:

- recognise the importance of cultural diversity;
- acknowledge that cultural goods and services are significantly different from other products;
- acknowledge that domestic measures and policies intended to ensure access to a variety of indigenous cultural products are significantly different from other policies;
- set out rules on the kind of domestic regulatory and other measures that countries can and cannot use to enhance cultural and linguistic diversity; and
- establish how trade disciplines would apply or not apply to cultural measures that meet the agreed upon rules.

CONCLUSION:

Australia is presently the most open market for audiovisual products and services. Australia has a \$647 million deficit with the US in the trade in film and television productions. The only way a small economy like Australia's can ensure that it retains cultural diversity is to maintain control of its right to shape and implement cultural policy. The AUSFTA severely diminishes the Australian government's ability to determine cultural policy within the audiovisual sector in the future, and thwarts the development of an industry derived from the emerging technologies.

RECOMMENDATIONS:

The AUSFTA in its present form should not be supported by the Australian Parliament because it is not in the national interest of this country. Australia should exclude all cultural industries from this and all future trade agreements through a comprehensive Cultural Reservation, negotiate a new international Multilateral Cultural Treaty that acknowledges the legitimate role of domestic cultural policies in ensuring cultural diversity, and pursue Multilateral and Regional Trade Treaties that provide fairer access to international trade while preserving domestic cultural policy and diversity.

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