

SUPPLEMENTARY SUBMISSION
BY
MEDIA ENTERTAINMENT AND ARTS ALLIANCE
TO
SENATE SELECT COMMITTEE
REGARDING
AUSTRALIA UNITED STATES FREE TRADE AGREEMENT

MAY 2004

The Media Entertainment and Arts Alliance

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

Pols press passage of Aussie trade pact

Calif. Dems say deal would create entertainment jobs

By SUSAN CRABTREE

WASHINGTON -- Several California lawmakers Thursday urged Congress to quickly approve the U.S.-Australia free-trade agreement, which would strengthen copyright protection for U.S. intellectual property and provide better market access for U.S. film and TV exports.

Democratic Los Angeles-area Reps. Howard Berman, Adam Schiff and Diane Watson predicted that the trade deal would create jobs for the entertainment industry in L.A. and urged the House GOP leadership to schedule a vote as soon as possible.

"This agreement ensures that Australia will continue to be one of our largest markets for entertainment products," Berman said in a statement.

Stuart Roy, spokesman for House Majority Leader Tom DeLay (R-Texas), does not expect a vote on the deal before June but noted that the issue is on the leadership's radar screen.

In an election year, Republicans are leery of forcing too many trade votes on members from key Southern districts who oppose free trade treaties.

Zero tolerance

U.S. trade reps finished negotiations in February, securing commitments from Australia for zero tariffs on all U.S. movies, music, consumer products, books and magazines exports.

Australia, which ranks as the eighth-largest market for filmed entertainment, also agreed to implement World Intellectual Property Organization Internet Treaties, which provide antipiracy protections for digital copyrighted material and extend the current term of protection for copyrighted works 20 years.

Variety 14 May 2004

With over 50 percent of Hollywood's annual revenue coming from overseas, it is abundantly clear that no expensive American film can be approved by a studio today until an assessment is made of its potential in major foreign markets. But despite its successes, Hollywood has remained disappointed in its growth overseas. Ten year ago the studios were predicting that, by now, foreign ticket sales would constitute 70 percent of their business.

Stanley Rosen¹

¹ *Hollywood, Globalization and Film Markets in Asia: Lessons for China?* Stanley Rosen, Department of Political Science, University of Southern California, 2003, page 5, available online at www.asianfilms.org/china

The Media Entertainment and Arts Alliance appreciated the opportunity to appear before the Senate Select Committee considering the proposed Australia United States Free Trade Agreement (AUSFTA).

The Alliance was asked to provide further comment on the following:

- the *Economic analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States* prepared by the Centre for International Economics (CIE) for the Department of Foreign Affairs (DFAT) and released by the Government on 30 April 2004;
- the manner in which the Annex I and Annex II reservations might be amended to better address the concerns of the cultural industries, and
- comment on how emerging technologies like digital recorders – such as TiVo – might affect the broadcasting sector.

Economic analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States

Economic analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States (2004 CIE report) was prepared by the CIE for DFAT in order to inform public consideration of the draft text of the AUSFTA and the considerations of the two Inquiries examining the agreement, the Joint Standing Committee on Treaties (JSCOT) and the Senate Select Committee. It was due to be released by 8 April 2004 just prior to the closing date for submissions to the JSCOT Inquiry. It was released on 30 April. Consequently, time to adequately consider the report has been limited.

In 2001, in the lead-up to the negotiations, CIE was asked by DFAT to consider the impact an AUSFTA would have for Australia. That paper, released in June of 2001, *Economic impacts of an Australia-United States Free Trade Area* (2001 CIE report), found that:

- welfare (real household consumption) and production (GDP) would rise for both countries over time, “with the removal of barriers to trade assumed to be over a five year period”²;
- “Australian GDP could be 0.33 per cent higher by 2006. This gap would then continue to widen, levelling off by 2010 at 0.4 per cent of GDP – an annual increase in that year of nearly US\$2 billion.”³

In addition to assuming trade barriers would be removed over five years, the study assumed “complete removal of all identified barriers to trade between Australia and the United States”⁴.

Recognising that it was likely all trade barriers would not be removed, a 50% removal of barriers was estimated to give roughly half the full liberalisation results, and a 25% removal of barriers would deliver roughly a quarter of the potential gain.⁵

In respect of the audiovisual industry, the report noted that the Government amended the *Broadcasting Services Act 1992* to limit the effect of the High Court decision that found the Australian Content Standard was in conflict with Australia’s international agreements,

² *Economic impacts of an Australia-United States Free Trade Area*, Prepared for Department of Foreign Affairs and Trade, Centre for International Economics, June 2001, page vii

³ Ibid

⁴ Ibid, page ix

⁵ Ibid

specifically the CER agreement between Australia and New Zealand. The report continued, “Given this last point, and the fact there is uncertainty as to which quotas influence broadcasting decisions and the difficulty of modelling these barriers anyway, we are not attempting to incorporate these restrictions in our quantitative analysis”⁶.

Not surprisingly, as it is not normally considered to be a trade agreement issue, the paper did not examine the likely impact of extension of copyright term.

As it was anticipated that the AUSFTA would include, in line with Government policy, Annex II reservations covering the cultural industries (as is the case in the Singapore Australia Free Trade Agreement [SAFTA]) and, again in line with Government policy, copyright term would not be extended, the exclusion of modelling liberalisation of the cultural industries should not have been an issue, save for the fact it was anticipated considerable pressure would be brought to bear by the United States for substantial concessions to be made.

DFAT also commissioned the Australian APEC Study Centre, based at Monash University, to prepare an analysis of the impact on Australia of an AUSFTA. Their report was released in August 2001. That report concluded “The benefits for Australia in negotiating an FTA with the United States are significant and wide-ranging. There will be an immediate benefit of attracting greater investment from the United States and increased trade as a result of the removal of trade barriers. A Free Trade Agreement between Australia and the United States would inject a new dynamism into the liberalisation process.”⁷ The report identified two long term benefits: “It is appropriate that the defence core of the relationship be broadened by adding an economic core given that in today’s world, nations mark closeness of relationships between states by economic linkages as much as military linkages. The second is the importance of a close economic relationship with the United States as the globalisation of the world’s economies proceed and, more importantly, the impact of the Information Age continues to evolve.”⁸

The APEC report noted US pressure to remove restrictions in broadcasting of film and television in international agreements and noted the US considered the Australian Content Standard as being a barrier to trade. The Report goes on to say:

“This has led to concerns expressed by Australian cultural industries – film and television production in particular – that an FTA will lead to removal of the preferences granted to Australian cultural industries. These concerns have been intensified by the successful campaign to have its audiovisual products given national treatment for the purposes of filling local content quotas in Australia. However, in the wake of this case, the Government made a commitment to protect the Australian audiovisual industry in future trade agreements.

“Experience of other FTAs is enlightening in this respect. Under NAFTA, Canada has exempted its cultural industries from the scope of the provisions on services. This has also been the experience under the GATS negotiations where most countries, including Australia, exempted audiovisual services from the application of the agreement.”⁹

Thus, it appears the APEC Report relied on Government assurances that cultural industries would be exempt from trade agreements including the AUSFTA.

⁶ *Economic impacts of an Australia-United States Free Trade Area*, Prepared for Department of Foreign Affairs and Trade, Centre for International Economics, June 2001, page 67

⁷ *An Australia-USA Free Trade Agreement: Issues and Implications, A Report for the Department of Foreign Affairs and Trade*, APEC Study Centre, Monash University, 2001, page xix

⁸ Ibid

⁹ Ibid, page 42

The first report to question whether considerable benefits would accrue to Australia from an AUSFTA was *A Bridge Too Far?* prepared for the Rural Industries Research and Development Corporation by ACIL Consulting and released in February 2003.

That report found “the economic benefits of the FTA to Australia as a whole are, at best, very finely balanced. The impact on Australian farmers is likely to be negative, especially if domestic political considerations in the US prevent genuinely free trade in the most sensitive industries – sugar, dairy and meat. Given this, the case for the FTA must rest on broader strategic arguments, the articulation of which has not been clear to date.”¹⁰

It also found “that most local content quotas are redundant in the sense that the media firms choose to have local content above the quota level because that reflects customer demand”,¹¹ a position that does not stand up to scrutiny of local content compliance, especially for children’s programming, drama and documentaries on free to air commercial television nor in respect of compliance with the expenditure requirement for predominantly drama pay television channels. In its review of broadcasting conducted in 1999, the Productivity Commission found that “[m]any Australian programs rate well (and thus supply audiences for advertisers), but they will not be preferred by broadcasters if the program costs relative to advertising revenue are higher than those for imported programs.”¹² The Commission elaborated on this point in its final report as follows: “For the commercial broadcaster, the decision to broadcast a particular program does not depend on its social and cultural value to the community. The broadcaster’s main concern is the program’s ability to generate a profit – that is, its advertising revenue relative to its cost. High cost programs with social and cultural value may be vulnerable to replacement by programs with a better revenue-to-cost ratio, even if the alternative is less popular with viewers and advertisers ... Programs that are popular or valuable to the community will therefore not necessarily be provided by the market.”¹³ The Productivity Commission also found “advertisers pay for broadcasting time according to whom they are reaching, not community welfare, and will not pay more to advertise during programs with greater social or cultural benefits.”¹⁴

Thus by the beginning of 2003, two reports examining the likely impact of an AUSFTA found there would be considerable benefits accruing to Australia, one found the benefits would at best be finely balanced and not one modelled the impact of making concessions in respect of Australia’s cultural industries.

The draft text of the proposed AUSFTA includes no increased access to the US market for some key sectors, including sugar, includes very long phase in periods for others and introduces snap back provisions for yet others. It does not incorporate overarching Annex II reservations covering cultural industries of the kind included in SAFTA and additionally agrees to extension of copyright term from life of the author plus 50 years to life of the author plus 70 years.

Consequently, it was surprising to discover that the 2004 CIE report concludes that the benefits to Australia will be even greater than those anticipated in 2001 and despite the considerable concessions made in the draft text for the audiovisual industries, the impact on the sector was not considered. The 2004 CIE report concludes that “A decade from now the

¹⁰ *A Bridge Too Far? An Australian Agricultural Perspective on the Australia/United States Free Trade Area Idea* A report for the Rural Industries Research and Development Corporation, ACIL Consulting, February 2003, page iv

¹¹ Ibid, page 16

¹² *Broadcasting Draft Report*, Productivity Commission, October 1999, page 205

¹³ *Broadcasting Inquiry Report*, Productivity Commission, 3 March 2000, page 383

¹⁴ Ibid

most probable effect of the Agreement on Australia's real gross domestic product (GDP) is an increase of \$6.1 billion per year"¹⁵ up from the US\$2 billion in ten years time claimed in the 2001 CIE Report. The 2004 report finds that "Investment liberalisation makes the biggest contribution to overall economic growth and welfare."¹⁶ Just why the benefits are now estimated to be so much greater when investment liberalisation was taken into account in the 2001 CIE report and when all barriers to trade have not been eliminated is not within the Alliance's competence to explain.

However, the Alliance is able to comment on the likely impact the draft text of the proposed agreement will have on the cultural sector. As has been argued in our submission to this and other Committees, the concessions made are not in line with Government policy and will have a serious impact on the accessibility for Australian audiences to Australian programs over time. The concessions stand in stark contrast to the wording in SAFTA. If the Government considered the likely impact of making concessions in SAFTA or the GATS to be deleterious to the sector and to Australian society more generally in the context of negotiations for those agreements, it is difficult to understand why concessions would now be made to the country that dominates not only our own market but the audiovisual market globally.

During the negotiations, the Alliance was advised by the Minister for Communications, Information Technology and the Arts, The Hon Darryl Williams, that the Government would make no concessions to the US regarding extension of copyright term. The Minister explained it was Government policy that copyright term not be extended because of the negative financial impact doing so would have on Australia. The Minister advised that his department, DCITA, had undertaken work on extension of term and had concluded the cost to Australia would be so considerable that reviewing Government policy could not be contemplated. The Alliance does not have access to the DCITA study. The CIE report finds that extending copyright term is unlikely to result in additional incentives to create new works, but may increase costs for consumers. Contrary to the Minister's advice, the report states "In many cases the increased cost faced by consumers is not likely to be significant"¹⁷ and goes on to say "it is not possible to derive any indication of the magnitude of the costs that may stem from the restriction of new works being created from existing works"¹⁸. If, as the Minister indicated, the costs to Australia that will arise by extending copyright term are significant, they have not been incorporated in the CIE analysis.

Additionally, in 1995, the Office of Regulation Review (ORR) made submission to the Copyright Law Review Committee's review of the *Copyright Act* (Cth) 1968 and recommended against an extension of copyright term.

"The ORR considers that a general extension of copyright protection ... would have few (if any) tangible benefits and holds the risk of substantial costs:

- it represents an unjustifiable redirection of funds (ie economic rents) from Australian consumers and secondary producers without commensurate benefits;
- it would be likely to cause an increase in net royalty flows to overseas authors and publishers;

¹⁵ *The Economic analysis of AUSFTA – Impact of the bilateral free trade agreement with the United States*, Report prepared for Department of Foreign Affairs and Trade, Centre for International Economics, April 2004, page ix

¹⁶ *Ibid*, page vii

¹⁷ *Ibid*, page 39

¹⁸ *Ibid*

- there is no evidence that it would provide a significant incentive to produce works not already being produced”¹⁹

The Review of Intellectual Property Legislation under the Competition Principles Agreement was conducted in 2000. The Final Report by the Intellectual Property and Competition Review Committee (IPCRC) to Senator the Hon Nicholas Minchin and the Hon Daryl Williams MP recommended as follows:

“The Committee is not convinced of the merit in proposals to extend the term of copyright protection, and recommends that the current term should not be extended.

“We also recommend that no extension of the copyright term should be introduced in future without a prior thorough and independent review of the resulting costs and benefits.”²⁰

The Government response was to accept both recommendations, going on to say “The Government has no plans to extend the general term for works (life of the author plus 50 years). It is considering extending the existing term of protection for photographs from 50 years after publication to life of the author plus 50 years, in line with the WIPO Copyright Treaty of 1996.”²¹

Thus the findings of the ORR and IPCRC are consistent with the advice given by the Minister but inconsistent with decision to extend copyright term agreed in the AUSFTA negotiations and with the findings of the CIE that costs would be negligible.

Estimating what the future cost of the concessions made in the proposed AUSFTA for the cultural industries is extraordinarily difficult as it is not known what new delivery platforms might be introduced, nor is it possible to accurately model how broadcasters might respond to the challenges of the future. However, capping Australian content will certainly restrict growth. The Australian audiovisual industry has consistently demonstrated that it can expand to fill need. The introduction of an Australian content standard in 1960 resulted in rapid growth in the television industry. When Government assistance was provided to the Australian Film Development Corporation (AFDC), the precursor to the Australian Film Commission (AFC), it was rare for even one feature to be made in Australia annually. Access to production funding led to the establishment in the 1970s of a burgeoning feature film industry with its output steadily growing. The sector expanded dramatically with the introduction of 10BA taxation concessions and contracted when those concessions were wound back at the end of the 1980s. The industry then responded to the establishment of the Australian Film Finance Corporation (FFC) and the size of the local industry has been shaped by the availability of funds invested by the FFC.

By way of example, the value of drama production undertaken in Australia grew from \$404m in 1993/94 to \$897million in 2001/02 as follows:

¹⁹ *An economic analysis of copyright reform*, A submission to the Copyright Law Review Committee’s review of the *Copyright Act* (Cth) 1968, Office of Regulation Review, page 5, available online at www.pc.gov.au/orr/reports/submission/ecoanala/

²⁰ *Review of intellectual property legislation under the Competition Principles Agreement*, Final report by the Intellectual Property and Competition Review Committee to Sen. The Hon Nicholas Minchin Minister for Industry, Science and Resources and the Hon Daryl Williams AM QC MP Attorney-General, September 2000, page 84, available online at www.ipcr.gov.au

²¹ Government response to Intellectual Property and Competition Review Recommendations, available online at <http://www.ipaustalia.gov.au/pdfs/general/response1.PDF>

Film and television drama production in Australia in \$M²²

	1993/94	2001/2002
Australian	299	343
Co-productions	0	140
Foreign	105	413
Total	404	897

Thus, over the period, Australian drama production grew by 15%, co-productions – those productions jointly produced by an Australian producer and a producer from overseas – grew from zero to \$140 million, and foreign production – those productions that emanated from overseas but chose to film in Australia, recruiting Australian personnel – grew by 298%. And the industry was able to grow to fill the demand.

Given the financing model of the broadcast sector, regulatory intervention is the Government's most effective – not to mention cost effective – mechanism to foster Australian content. The industry has always been able to expand to deliver increased content requirements.

To curtail the industry in the manner prescribed by the reservations in the AUSFTA will have the effect of deliberately constraining rather than fostering growth.

The Annex I and Annex II reservations

The only appropriate outcome for the cultural industries would be the inclusion of an Annex II reservation in line with the reservation in SAFTA. A copy is attached.

The Alliance understands that the negotiations have concluded and the reservations cannot now be renegotiated. If this is not the case, then reservations in line with SAFTA must be negotiated. If this is not possible, the Alliance considers it is not in the national interest for the agreement to enter into force.

If it is the case and, as the Alliance understands, all that is now possible is rewording for certainty during the course of the current “legal scrub”, and the agreement is to enter into force, then certain amendments as detailed below must be made.

Proposed amendments to be incorporated in the “legal scrub”

Annex I-14 (a) – free-to-air commercial television

The Annex I reservation confines the overall transmission quota for free-to-air commercial television to 55% and in respect of subquotas, specifies as follows: “Subquotas for particular program formats (eg drama, documentary) may be applied within the 55% quota.”

Currently, subquotas exist for drama, children's programs, children's drama and documentaries. DFAT negotiators explained the intention of the above wording was to allow for the introduction of additional subquotas, for instance, for music programs, and allowed for the existing subquotas to be increased. The Alliance believes this is at odds with Clause 10.6.1(c) which specifies that while existing non-conforming measures may be retained they can only be amended if the amendment “does not decrease the conformity of the measure as it existed immediately before the amendment”. This wording would not allow for the

²² *Chasing the Runaway – Foreign film production and film studio development in Australia 1988-2002*, Nick Herd, Currency House, 2004, page 8

introduction of additional sub-quotas nor for an increase in transmission hours for existing subquotas.

The solution may lie in making the Annex 1-14 reservation an Annex II reservation. Doing so would remove the impact of the ratchet provisions on the subquotas.

Annex II-6(a) – multichannelled free-to-air television

This reservation covers multichannelled free-to-air commercial television broadcasting services and allows for the existing free-to-air content standard to be applied to an additional channel if the total number of channels does not exceed ten and in the event that it exceeds ten, the standard can be applied to one further channel. In respect of sub-quotas, it allows as follows: “Subquotas for particular program formats (eg drama, documentary) may be applied within the 55% quota in a manner consistent with existing standards.” The use of the words “in a manner consistent with existing standards” would prevent the introduction of subquotas for other program genres, for instance, music programs. It also does not allow for an increase in transmission hours within existing subquota types. Also see comments above regarding the Annex I reservation. The Alliance proposes the words “in a manner consistent with existing standards” be deleted.

Annex II-6(d) – pay television

The Alliance considers that constraining the Government’s ability to intervene in pay television to an expenditure requirement is inappropriate, as is the capping of what the Government might be able to introduce as an expenditure requirement and the restriction of any intervention to arts, children’s, documentary, drama and educational channels.

However, allowing the Government to increase the drama expenditure requirement to 20% in consultation with the US is completely inappropriate.

That the US will oppose such an increase is already clear.

Unfortunately, with regard to market access, Australia reserved the right to introduce some specific, new types of restrictions on American filmed entertainment in the future, such as increasing the investment obligations on channels of programming carried by satellite and cable and introducing restrictions on Internet-delivered programming. We fervently hope that Australian policymakers will never conclude that introducing restrictions of this type are necessary to meet their cultural or industrial policy goals.

Motion Picture Association of America²³

The Alliance recommends that the words “that includes consultations with any affected parties including the United States” be deleted along with the final sentence “Any increase imposed shall be non-discriminatory and no more burdensome than necessary.” The Australian Broadcasting Authority (ABA) has a history of conducting inquiries that take account of the needs of the Australian community and the needs of broadcasters. It is inappropriate to articulate in a trade agreement the manner in which inquiries that determine how Australia’s cultural objectives will be conducted.

Annex II-7(e) – free-to-air commercial radio

²³ Motion Picture Association of America statement on Australia-US Free Trade Agreement, 9 February 2004, available online at www.mpa.org/legislation/

Transmission quotas for radio should not be restricted to free-to-air commercial radio broadcasting services. It should remain the prerogative of Government to introduce them in respect of community radio. From discussions with DFAT negotiators it appears to have been an oversight. Consequently, the heading should be amended to read “radio broadcasting services”.

Annex II-7(f) – interactive audio and/or video services

This reservation covers “interactive audio and/or video services”. As argued in previous submissions, the Alliance understands this reservation was intended to cover new media and as such should not be worded in a manner that is technology specific. The Alliance considers the negotiators’ intentions would be better reflected if this reservation applied to “interactive audio and audiovisual services and all other audio and audiovisual services not yet regulated now known and yet to be devised”.

Treatment of subsidy

DFAT negotiators have assured the Alliance that Government assistance to the cultural industries by way of grants and subsidy is not covered by the AUSFTA. Similarly it was the Government’s intention that services supplied in the exercise of governmental authority will not be subject to the provisions of the agreement.

As noted in our April submission to this Committee, the Alliance is concerned that the provisions of Clause 11.9 of the Investment Chapter mean that grants and investments in intellectual property are subject to performance requirements and cannot be made subject to conditions such as those contained in Clause 11.9.2, including a requirement “to achieve a given level or percentage of domestic content”. Productions in receipt of funding from the AFC and the FFC, whether by way of grant or investment in intellectual property, are required to satisfy a “significant Australian content test” and thus seem caught by the provisions of Clause 11.9.2. It is to be hoped the issue has been addressed in the current legal scrub. If, however, this has not been achieved, the Alliance suggests that the reservation contained in Annex II-6(h) is reworded to include subsidy, grants and investments in intellectual property in addition to “Taxation concessions for investment in Australian cultural activity where eligibility for the concession is subject to local content or production requirements”.

Services supplied in the exercise of governmental authority

Although the government appropriation that underpins the ABC and SBS can be characterised as services supplied in the exercise of governmental authority, it is not clear that the public broadcasters are protected by the provisions of 10.1.4(e) of the Services Chapter as both broadcasters compete in the market – SBS competes with the commercial broadcasters for advertising and the ABC runs retail outlets, music and book publishing arms, merchandising and video and DVD sales. Consequently, unless the current ambiguity can be resolved in the legal scrub, the Alliance recommends an additional clause being added to Annex II-6 to specifically exempt national and community broadcasters.

Conclusion

Notwithstanding the suggested amendments that might be able to be incorporated during the “legal scrub”, the Alliance believes that the only satisfactory outcome will be the inclusion of comprehensive Annex II reservations that reflect those contained in SAFTA.

Recent events in Canada show why.

Canada first introduced content quotas in 1961 with an overall transmission quota of 40% increasing, in 1970, to 60% during the 18 hour broadcast day and to 50% between 6pm and midnight. (The quota for CBC, the public broadcaster, was slightly higher – a flat 60% throughout the broadcast day.)

Without subquotas specifying genre, the transmission quota was, with a few exceptions on CBC, filled with sports, news and game shows. In 1979, drama quotas were progressively introduced as a condition of licence. The requirements varied from one network to another. In 1982, expenditure requirements were introduced for pay television and subsequently extended to the networks.

Between 1985 and 1995, through the introduction of a drama quota – original hours and expenditure requirements – and subsidies from Telefilm Canada, Canadian drama on English language television doubled and on French language television it tripled. Thus effective government intervention by way of content standards and subsidy delivered a success story.

However, Canadian drama is now in freefall.

In 1998, the Canadian Radio-Television and Telecommunications Commission (CRTC) conducted a review of Canada's Television Policy and in 1999 amendments were implemented that resulted in a shift from specifying drama requirements to identifying priority program categories as follows:

- Canadian drama programs
- Canadian music and dance and variety programs
- Canadian long-form documentary programs
- Canadian regionally produced programs in all categories other than news and information and sport
- Canadian entertainment magazine programs

As drama is the most expensive form of television programming to produce, it was replaced by cheaper programs that satisfy other priority program categories. Total drama broadcast hours fell from 753 in 1999 to 486 in 2002.²⁴

When the Chrétien Government slashed the Canadian Television Fund by C\$25million last year, the situation for drama deteriorated further. In 1999, twelve Canadian drama series were on air. By mid 2003 the number was three. In May 2003, leadership candidate Paul Martin promised to restore funding to the CTF. Sworn in as Prime Minister in November, Martin did just that in this year's Federal Budget. Although the move was welcomed by the Canadian industry, until such time as the CRTC's Television Policy is amended and subquotas for drama programs reintroduced, it is unlikely Canadian audiences will see a return to pre 1999 levels of local content drama on their television screens.

The point is that Canada is able to make changes to the way it delivers its cultural policy as successive governments see fit. Changes made by the Chrétien Government can be amended by the newly installed Martin Government unconstrained by provisions set out in trade agreements. If and when Prime Minister Martin moves to rebalance the subquotas in the Canadian content standard, he will be able to do in any way his government considers appropriate. Standstill, ratchet provisions, caps, mandated mechanisms of support and consultation with the US will not impede his government's ability to act in the best interests of Canadian audiences.

²⁴ *The Crisis in Canadian English-Language Drama* – A report prepared by the Canadian Coalition of Audio-Visual Unions, March 2003, available online at www.actra.ca

Emerging technologies

At the Committee hearings, the Alliance made mention of the ways in which media might change in the future including TiVo about which Committee members sought more information. TiVo is a brand name for a digital video recorder.

“TiVo® is a one-of-kind service that operates a digital video recorder (DVR), which is like a VCR but with a hard drive. It digitally records up to 140 hours of your favorite shows automatically, every time they’re on, without the hassles of videotape. That way, all of your entertainment is ready-and-waiting for you to watch, whenever you are. Just buy a DVR, activate TiVo service and enjoy TV your way.”²⁵

- **“Record up to 140 hours of your favourite shows without videotape**
- **“Control live TV – pause, rewind, slow-mo, and instant replay**
- **“Broadband connectivity so you can enjoy Digital Music, Digital Photos, Remote Scheduling and more – all on your TiVo DVR**
- **“Works with everything: cable, digital cable, satellite, antenna, and combinations”²⁶**

With TiVo, it is possible to watch a prerecorded program while recording another live program. With DIRECTV DVR with TiVo service, it is possible to record two shows at the same time and watch a third prerecorded program. The TiVo remote control has three speeds of fast forward and rewind that enable the viewer to skim through any part of a recorded program including commercials. “Often, TiVo subscribers sit down to watch a 60-minute ‘live’ program 20 minutes past the start time so they can skip past the commercials and catch up to ‘real’ time by the program’s end. You can also jump ahead or back in 15-minute increments, making getting through halftime a little easier.”²⁷

Although TiVo is available in the US, it is not yet available in Australia. However, Foxtel, which recently launched a 130 channel subscription service, is reported to be launching a version of TiVo. In May last year, Foxtel announced it will deploy a raft of OpenTV technologies later this year to support its ITV services on its existing digital satellite network and its planned digital cable network.²⁸

Reliant as it is on advertising revenue, technologies that enable viewers to skip the advertising, such as TiVo and other digital video recorders, will affect the financing that underpins free-to-air commercial television. In the US, the manner in which advertising is being delivered to television audiences has already started to diversify. For instance, some programs, including drama series, are financed by advertisers who then pay the broadcaster to screen the program. The advertising messages are embedded in the content. Product placement has become a significant advertising stream – from the watch, the clothes and shoes the cast wear, the restaurant chains where they eat, the breakfast cereal, the takeaway food, the cars they drive to, notoriously, the cigarettes they smoke.

US advertisers like Johnson & Johnson, Unilever, Ford, Kellogg and Procter & Gamble have funded the development of television programs like *Gilmore Girls*, *8 Simple Rules for Dating My Teenage Daughter* and *American Dreams*. Procter & Gamble helped fund *Sabrina the Teenage Witch* and the soapie *Santa Barbara* which they gave to Network Ten free of charge.

²⁵ www.tivo.com

²⁶ www.tivo.com

²⁷ www.tivo.com

²⁸ Interactive TV Today – Interview with James Ackerman, CEO of Open TV about the Open TV Foxtel deal, 14 May 2003, available online at www.itvt.com and

t-commerce will take the way in which advertising is delivered one step further. t-commerce is the ability to purchase goods “as seen on TV” using technology embedded in set top boxes. Trintech, a founding member of the TV Linux Alliance, which is helping to define Linux standards for the digital set top box market, describes t-commerce as the next wave of e-commerce. “For example, while watching your favourite TV program, you use your remote control to purchase a list of goods associated with the show.”²⁹ Its advantages to service operators are considered to include increasing revenues, subscribers and customer retention.

According to Trintech, “t-commerce opens up unprecedented opportunities for merchants to present their products in new and exciting ways to the TV audience, taking advantage of broad bandwidth and the ability to sponsor TV programming and deliver advertising while linking to the product offering.”³⁰

t-commerce is thus set to transform the financing model that underpins subscription television and could render expenditure requirements meaningless.

The current expenditure requirement for drama channels is 10%, which, under the provisions of the AUSFTA, after consultation with the United States, may be increased to 20%. As argued to this Committee, the current 10% requirement delivers approximately 3.6% of content on subscription drama television channels. However, if over time, advertisers chose to sponsor programs rather than subscription television acquiring the rights to broadcast the program and then separately seeking advertisers, the expenditure requirement is likely to deliver even smaller dividends in terms of Australian content than is currently the case – and governments of the future will have no capacity to introduce new regulatory requirements, such as an expenditure test tied to revenue or a transmission quota.

Australia’s trade objectives

In 2003, DFAT released *Advancing the National Interest, Australia’s Foreign and Trade Policy White Paper* (White Paper). The White Paper argued the importance of exporting an image of Australia as a sophisticated, successful and influential nation. “The Government strongly believes in the value of promoting Australia’s artistic and cultural achievements to international audiences to showcase the talents of our vibrant and diverse society. Aside from its intrinsic value, the promotion of Australian art and culture is a practical policy to advance our national interests by fostering respect for Australia and its accomplishments.”³¹

The White Paper also commented on its agenda for free trade agreements: “The Government will pursue free trade agreements in a way that is fully consistent with our WTO commitments and does not take the pressure off multilateral liberalisation. The free trade agreements that the Government negotiates will be comprehensive, not leaving out areas that our partners might find difficult, such as agriculture.”³²

In respect of a free trade agreement with the United States, the White Paper stated “An FTA that removed all barriers and harmonised standards could produce net economic welfare gains of about \$40 billion, shared almost evenly between both countries, over 20 years”. In other words, DFAT estimated a gain for Australia of \$1 billion annually. This estimate is at odds with the 2004 CIE report’s estimate and throws into question whether the CIE modelling is seriously inflated given that all barriers have not been removed and standards not harmonised.

²⁹ www.trintech.de

³⁰ Ibid

³¹ *Advancing the National Interest, Australia’s Foreign and Trade Policy White Paper*, Commonwealth of Australia, 2003, available online at www.dfat.gov.au, page 129

³² Ibid, page 59

On the other hand, the White Paper sets out the Government's goal "to double the number of exporters to 50,000 by 2006" because "[t]his could create additional export revenue growth of over 5 per cent a year, or \$40 billion over the five year period".³³

Today we are now considering draft text for an AUSFTA that has not delivered the removal of all barriers, makes significant compromises in agriculture, does not reflect Australia's negotiating position in respect of GATS in key areas like the cultural sector, is not consistent with Government policy for the cultural sector or in respect of copyright term and will profoundly damage the very industries most effective in promoting Australia as a confident sophisticated country internationally.

The Alliance considers Government resources would be better utilised pursuing the export promotion strategy outlined in the 2003 White Paper and walking away from an agreement that compromises the national interest, Australia's multilateral trade objectives and constrains the growth and development of the cultural industries.

³³ *Advancing the National Interest, Australia's Foreign and Trade Policy White Paper*, Commonwealth of Australia, 2003, available online at www.dfat.gov.au, page 66