SECOND SUPPLEMENTARY SUBMISSION

BY

MEDIA ENTERTAINMENT AND ARTS ALLIANCE

TO

SENATE SELECT COMMITTE

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.

The Media Entertainment and Arts Alliance is making this further submission to the Senate Select Inquiry into the proposed Australia United States Free Trade Agreement in order to bring to the attention of Senators three key developments not canvassed in earlier submissions.

1. United States Government assistance to the American film industry

It is a common misconception that the American film and television industry does not receive government support by way of subsidy, regulatory intervention, tax concessions or by any other mechanism typically available to industries in other countries with developed film and television industries.

2. Opposition to the agreement in the United States

The concerns expressed by many sectors in Australia about the proposed agreement are mirrored in the United States.

3. Concerns raised by the final text of the agreement

The final text of the proposed agreement was not available at the time earlier submissions were made. Following signature of the agreement, it was published on the Department of Foreign Affairs and Trade website. As anticipated, the final text does not assuage Alliance concerns.

United States Government assistance to the American film industry

As the United States was negotiating with Australia to maximise access for American film and television productions to the Australian audiovisual market and minimise the extent to which the Australian government will be able to intervene in the future to support Australia's audiovisual industry, it was simultaneously fighting challenges from the European Union (EU) over the manner in which it supported its own industry and exploring ways to circumvent World Trade Organisation (WTO) rulings.

In 1997, the EU challenged the Foreign Sales Corporation (FSC) provisions of United States tax law, arguing the provisions represented an illegal export subsidy under WTO rules. The FSC Program was a program that allowed companies to avoid paying taxes income earned on exports.

The United States repealed the FSC rules and, in November 2000, Congress passed the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (ETI Act). Like the FSC, the ETI Act provided an exclusion from tax for foreign sourced income. The US argued that the ETI Act was WTO compliant and that, to the extent possible within the parameters of the US tax framework, it was designed to replicate the tax treatment of offshore generated income under European tax systems.

The ETI Act was immediately challenged by the EU and ruled insufficient by the WTO. A WTO arbitration panel issued a report authorising the EU to impose in excess of $4 billion in annual retaliatory sanctions and the EU prepared a retaliation list of US products.

The US Congress did not want a repeal of the ETI Act to result in tax increases for US exporters but nonetheless it was imperative that a mechanism be introduced that would enable compliance with WTO obligations and avoid the introduction of retaliatory sanctions from 1 January 2003.

Three separate bills were drafted that would repeal the ETI Act and reform the tax legislation in a manner that would benefit all US exporters, including those who had benefited under the previous tax credit regimes. However, disputes between the sponsors of the three versions meant none proceeded and the January 2003 deadline passed without the repeal of the ETI Act.

The EU agreed to hold off imposing sanctions for a further twelve months and finally, this year, bills have been debated in both the Senate Finance (S. 1637) and House Ways and Means (H.R. 2896) Committees that would repeal the ETI Act and implement tax relief aimed at domestic manufacturing.

On 11 May, the Senate passed, by a vote of 92-5, a corporate tax bill that repeals the ETI Act and replaces it with provisions and benefits to encourage manufacturers and multinational corporations to keep production onshore including a provision that provides a tax deduction when 75% of the content of a film or television production is made in America.

The House of Representatives must now pass their own version of a corporate tax bill. The current version of the House bill, the *American Jobs Creation Act of 2003*, sponsored by the Chairman of the House Committee on Ways and Means, Bill Thomas, aims to deliver compliance with WTO obligation. However, as the repeal of the FSC/ETI will raise the tax burden of the current beneficiaries, the new corporate tax bill is designed to return that money to US manufacturers (estimated to be at least $50 billion over ten years[1]). Unlike the legislation passed in the Senate, the legislation before the House of Representatives does not currently include additional provisions for domestic film production but this is expected to change before the bill is voted on. Once the House passes its corporate tax bill, the differences between the House and Senate versions will need to be resolved.

Opposition to the agreement in the United States

The Screen Actors' Guild (SAG) is the organisation that represents American actors who work in the film industry. On May 17, SAG and the Alliance jointly announced their opposition to the proposed free trade agreement in the following terms.

The Screen Actors Guild (SAG) and the Media Entertainment & Arts Alliance (the Alliance) which represent audiovisual performers in the United States and Australia, respectively, urge the United States Congress and the Australian Parliament to reject the proposed Free Trade Agreement ("FTA") recently negotiated by representatives of their two governments.

SAG and the Alliance submit that the recently negotiated FTA should be rejected because it:

1. unnecessarily restricts Australia's ability to formulate and adopt policies necessary to support social and cultural objectives on free-to-air multi-channeling, subscription television and new media and digital audiovisual services, and
2. improperly requires recognition of the US work for hire doctrine in Australia to the detriment of US performers and their ability to share in royalties generated from the exploitation of their performances in Australia.

SAG and the Alliance believe that any FTA must be based on the following principles:

1. the right of performers to practice their craft in their country of origin and in doing so to give voice to their nation's history and aspirations;

[1] Hon Philip M. Crane, of Illinois, speaking in the United States House of Representatives in support of the *Job Protection Act of 2003*, April 12, 2003, available online at www.thomas.loc.gov

2.	recognition of the important role that performers play in portraying a nation's culture both within their country and to the world;
3.	the right of a nation to support and promote its own culture in all media and to enact legislation to carry out this goal, provided such legislation does not result in an unreasonable restriction on the free flow of media products from other countries;
4.	the right of all performers to protect their images, voices and likenesses and to share in the economic rewards from the distribution and exhibition of productions in which their performances have been captured.[2]

Commenting on the proposed agreement, SAG senior legal advisor John McGuire said, "The fight for free trade is premised on fair trade, and this agreement is unfair to performers. Among its flaws, the agreement in its current form undermines both Australian culture and the rights of U.S. actors to fair and full compensation for their performances. We urged the U.S. Trade Representative to support America's working actors by rejecting the 'work-for-hire' language contained in this agreement that will take rights and royalties away from U.S. artists and hand them over to producers. Unfortunately, the Administration failed to heed the call of U.S. performers to protect them from the forced forfeiture of their rights. The fact that Australian actors and American actors are standing shoulder to shoulder in opposition to this agreement is a powerful statement that the pact it is not yet ready for prime time."

Opposition is not confined to SAG.

The US Government's Labor Advisory Committee is responsible for providing advice to the US Government on the impact of trade agreements. Its report on the proposed Australia US free trade agreement finds that the agreement "will not protect the core rights of workers in either country, and represents a big step backwards from the Jordan FTA". It goes on to say "Provisions on investment, procurement and services constrain our ability to regulate in the public interest"[3].

Concerns raised by the final text of the agreement

The Alliance was appalled to discover that the agreement was signed by Minister for Trade Mark Vaile prior to the final text being made available publicly.

In hearings before the Committee, the Alliance noted that concerns about the draft text had been advised to the negotiators. The Committee asked the Alliance to make further submission detailing specific concerns with the drafting. This the Alliance did earlier this month.

It is disappointing that the majority of the concerns expressed by the Alliance have not been addressed in the final text. Indeed, other than the concern expressed in respect of radio broadcasting, none have been satisfactorily addressed.

The Alliance expressed concerns about how investments in film and television productions made by organisations such as the Film Finance Corporation Australia (FFC) might be affected by the draft agreement. That concern appears to have been addressed as follows.

The draft text included an Annex II reservation in the following language:

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[2] Joint SAG Alliance statement available online at www.sag.org and at www.alliance.org.au

[3] Report of the Labor Advisory Committee on Trade Negotiations and Policy to the United States Trade Representative on the US-Australia Free Trade Agreement, 12 March 2004, available online at http://www.ustr.gov/new/fta/Australia/advisor/lac.pdf

"Taxation concessions for investment in Australian cultural activity where eligibility for the concession is subject to local content or production requirements."[4]

The above reservation has been replaced in the final text in the following terms:

"Subsidies or grants for investment in Australian cultural activity where eligibility for the subsidy or grant is subject to local content or production requirements."[5]

The Alliance questioned why the reference to taxation concessions had been removed and was advised that, in trade terms, taxation concession are considered to be subsidies because they are a form of indirect support.

If this is the case, it begs the question why were taxation concessions explicitly covered in the draft text.

The Alliance considers this to be yet another instance wherein Australia will be exposed to challenge in the future on the basis of lack of certainty. As with the use of "interactive audio and/or interactive video services", the terms have not been defined.

The Alliance notes that the use of "interactive audio and/or interactive video services" remains unchanged from the draft text to the final text. It is of real concern that if, as previously advised, this terminology was intended to cover new media – currently known and yet to be devised – that it was not possible for certainty to be achieved by the inclusion of a definition.

Conclusion

The Alliance believes that unless a comprehensive Annex II reservation for the cultural industries that reflects the reservation in the Singapore Australia Free Trade Agreement can be negotiated in the agreement with the United States, the agreement should be opposed.

At a time when change is occurring in the audiovisual and cultural sector at an ever accelerating pace, it is not in the national interest to tie the hands of future governments to intervene in any manner they may see fit in the future.

At the Inquiry hearings, Senators expressed interest in DVRs. The impact that DVRs will have in coming years on the shape of free to air and subscription television is discussed in the attached article in the *Sydney Morning Herald* on 28 May 2004. The impact of such technology will have to be considered in the context of several forthcoming Government inquiries as well as in coming years as the introduction of such technology changes the financial base on which free to air television is constructed.

A number of inquiries have recently been announced in accordance with Clause 60(1) of the Broadcasting Services Act which provides for a number of reviews to be undertaken prior to 1 January 2005. It will be unfortunate if the public debate appropriate for such reviews is constrained by the provisions of the free trade agreement.

The first is a review of the viability of creating an Indigenous television broadcasting service. The discussion paper has been released and comment is sought by August. The second is a review of digital television broadcasting simulcast restriction (encompassing multichannelling) and restrictions on the provision of subscription and other services in the

[4] Annex II-7 (h) of the draft text of the agreement, previously available at www.dfat.gov.au
[5] Annex II-Australia-7 (g), available online at www.dfat.gov.au

digital spectrum. Again a discussion paper has been released and comment is sought by July. A further three are scheduled this year.

ATTACHMENT

DVRs have TV industry worried[6]

Miami
May 28, 2004
It's more than just this season's passing of *Friends*, *Frasier* and *The Practice* that has the television industry worried about what we'll be watching in seasons to come.
Television is going through yet another major transformation, and this time it isn't the arrival of colour TV, cable TV or even reality shows that's to blame. This time, it's Silicon Valley technology that's stirring things up.
Digital video recorders and video-on-demand systems, expected to hit mainstream markets this year, will give a new generation of viewers greater control over what, when and how they watch television. In anticipation, advertising executives, as well as the folks at Nielsen Media Research, already are starting to alter the way they do business to accommodate the changes that could come sooner rather than later.
"Essentially, we are in a stage of total potential chaos," said Michael Kassan, a Los Angeles media and entertainment consultant.
If the DVRs' ad-skipping technology goes mainstream, then television viewers become armed with another tool to help them avoid commercials. If fewer people are watching those commercials, advertisers might be inclined to bail out of the TV market and take their dollars elsewhere. That, in turn, could affect programming if networks can't generate enough revenue to produce quality shows.
Whether this scenario plays out remains to be seen. But a recent survey conducted by Forrester Research found that nearly 75 of advertisers said they likely will cut spending on television advertising when DVRs penetrate 30 million households.
Today, there are fewer than 5 million DVRs in households nationwide. But such is their popularity that San Jose, California-based TiVo has managed to sign more than 1 million subscribers over the past few years, mostly on word-of-mouth marketing. Even more have signed up for DVR service through Dish Network.
Consumers' infatuation with the DVR has made advertisers realise that the 30-second commercial could start to be a bad investment.
The ad-zapping DVR simply creates a new challenge for people who've been on this ride before, said Cotton Stevenson, a creative director with Elsewhere Advertising and Communications in San Francisco.
"Ad skipping is always a problem, always has been," said Stevenson, who recalls when the remote control - and its ability to easily switch channels during a commercial - first hit the scene.
"Even during the '50s and '60s, when ad-skipping meant getting up to fix a sandwich during the commercial, it was a problem," he said.
The number of DVRs is expected to reach the 30 million mark over the next five years. But that rate of adoption could skyrocket if cable TV powerhouses like Comcast and Time Warner follow through on plans to offer a DVR in their set-top boxes over the next year.
Satellite providers - with about 23 million combined subscribers - wouldn't hit that mark even if every satellite household had a DVR. But cable TV, with an estimated 68 million subscribers, has a greater reach and could take the DVR from a niche product to the mainstream.

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[6] *Sydney Morning Herald*, 28 May 2004, available online at http://smh.com.au/articles/2004/05/27/1085461890738.html

Already, advertisers are looking at creative ways to put their brands and products into the public eye. Product placement is one way. For instance, customers on The Restaurant pay their tabs with American Express cards. Sponsorships - much like the cigarette companies sponsored TV shows in the 1950s - are another.
In the Forrester report, 86 per cent of those surveyed believe that new forms of TV ads will evolve to be as effective or more effective than the 30-second ad.
Consider the different forms of advertising found on American Idol. AT&T Wireless, Coca-Cola and Ford are obvious sponsors and have been effective at getting their names out there with and without 30-second spots.
The AT&T Wireless logo appears on the screen alongside the instructions on how to vote for the singers. Coca-Cola glasses are strategically placed in front of the judges. And the singers that have become overnight celebrities are starring in the Ford commercials that appear to be part of the show.
The Forrester survey reported that 91 per cent of respondents said the TV industry will need new ways of measuring how audiences are watching television.
Nielsen Media Research started using People Meters - electronic devices that connect to the television to record the viewing habits - in Boston two years ago. The company will introduce the devices in San Francisco, Los Angeles, Chicago and New York markets later this year.
"It's a much more accurate picture and really helps the market place overall," said Jack Loftus, a vice president with Nielsen in New York.
Earlier this year, TiVo hired Nielsen to anonymously measure how often its subscribers pause and rewind, when they playback and whether they stop and watch any of the commercials.
Nielsen also wants to monitor other DVR services and provide new information to an advertising industry that's trying to understand high-tech TV viewers.
Some in the industry hope to fight ad-zapping by offering consumers a DVR-like alternative in free video-on-demand.
For some time, cable companies have been interested in video-on-demand, which allows viewers to choose from recorded or downloaded shows through the remote control.
Brian Weiser, director of industry analysis at New York research firm MAGNA Global, said programming stored on the cable provider's servers would give the company control of the playback, blocking viewers' ability to skip commercials.
DVRs and video-on-demand systems tend to be concentrated in tech-savvy regions such as Silicon Valley and other major metropolitan areas. Those newcomers will only discover what their cable providers offer: a box that allows you to find your favourite shows on a now-playing list and watch them free of charge later.
And they won't have to figure out how to program the VCR to do it.
But the cable companies need the rights to distribute copyright-protected television shows that way. And if the television industry moves as slowly as the recording industry did in dealing with music downloads, they may miss the opportunity to hang on to some more of that old business model revenue before Silicon Valley hammers the last nail in its coffin.
KRT