

## Trade and Cultural Diversity: An Australian Perspective<sup>1</sup>

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**ABSTRACT** *The article reviews implications for Australian cultural policy likely to arise from proposals for the development of a binding UNESCO convention on cultural diversity that would allow countries to pursue domestic cultural assistance policies that might otherwise be in conflict with trade liberalisation of cultural goods and services. The proposal, which is supported by a sizeable number of countries, is seen as an alternative to a GATS cultural exception. Recent Australian undertakings in bilateral trade agreements suggest that Australian Cultural Policy favours a GATS cultural exception approach.*

**Keywords:** trade; cultural diversity; UNESCO; GATS; cultural exception.

### Introduction

Trade in cultural products sits uncomfortably at the crossroad of the economics of trade and the social value system of a society. From a purely economic perspective, the promotion of trade, which enables specialisation of production systems on the basis of comparative advantage, can be easily shown to lead to improved efficiency and increased economic welfare for the trading partners. The focus of such a consideration is the relative efficiency with which the trading partners can produce a given product with attributes that are assumed to be unaffected by the location in which they are produced. On the other hand, from a social value system perspective, in addition to their economic value, some cultural products are considered to have inherent attributes that reflect the culture and values of consumers for whom they are produced.

Because of these different perspectives, the accommodation of cultural policy within the international trading framework has become a vexed question. Many countries have acted to protect domestic production of cultural products, particularly audio-visual products, from import competition. Such initiatives have come under increasing challenge in international trade negotiations and were highly contentious during the GATT Uruguay Round negotiations when France and several other countries failed to secure agreement on a 'cultural exception' to

exempt audiovisual services from GATS rules. Proponents of a cultural exception argue that it is justified because cultural goods and services embody a 'cultural value' that makes them different from mere economic commodities.

UNESCO's recently announced proposal for the development of a binding international convention on cultural diversity seeks to establish the right of countries to pursue domestic cultural assistance policies that might otherwise be in conflict with trade liberalisation of cultural goods and services. The proposal, which is supported by a sizeable number of countries, is seen as an alternative to a GATS cultural exception.

### **Justification of Special Treatment**

In Australia, a wide range of cultural activities receives special treatment from the government. Most of the supported activities (arts, theatre, dance, orchestras, museums, galleries, etc.) are primarily domestic in nature and are largely insulated from external (international) competition. Indeed, for many of these activities (for example, art, theatre, dance, orchestras, etc.) international exposition in the domestic market is actively promoted and supported. Trade becomes an issue where imported cultural commodities are in direct competition with similar domestically produced commodities.

Most of the concern about the impact of trade seems to be related to the audiovisual sector and primarily to film, television programmes and advertising, and recorded music. Various financial and regulatory mechanisms are used to support these activities. Lobbying for government support for these activities often employs emotive appeals and alarmist predictions about the risk to national pride and identity such as 'If we don't tell our own stories and sing our own songs, or dream our own dreams, we might as well pack up and go to California'<sup>2</sup> or 'What will be unique about Australia if our songs, stories, pictures and ideas are crushed under the weight of a boot made somewhere else'.<sup>3</sup> Central to the arguments for special treatment is the principle that access to, and participation in, a national culture is a fundamental right of citizens. An open trading regime, driven by economic incentives alone, can be a danger to this fundamental right if it leads to excessive replacement of domestic cultural commodities with imported commodities embodying attributes of a foreign culture.

In official policy statements, assistance to the Australian audiovisual industry is justified as being in the pursuit of cultural and social objectives that promote a national culture. In relation to Australian television programmes, for example, the stated objective of the Australian Content Standard (the regulation) is 'to promote the role of commercial television in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to television programs produced under Australian creative control'. This reflects one of the objectives of the Broadcasting Services Act 1992, namely 'to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity', which as the Explanatory Memorandum to the related Bill explains 'recognises that broadcasting can play an important role in shaping Australia's collective views, values and culture'.

Implicit in these objectives is an acceptance of the concept that certain commodities and services possess an intrinsic cultural value. However, that value is not quantifiable in money terms alone and policy makers need to adopt other measures to optimise its benefits to society.

Culture is an elusive, not easily definable concept. We all have different views about what constitutes culture based on our own individual values, but generally we tend to see culture as something derived from activities we undertake as a society and from our historical, artistic and traditional heritage. While culture certainly has personal significance to each one of us, it is regarded as having a much greater collective significance for society as a whole. Therefore, while the consumption of cultural goods and services generates direct personal benefits to us as individuals, it is also thought to generate substantial indirect benefits to our society. Indeed, it is fair to say that a cohesive national culture and identity would not be possible without shared cultural experiences.

Arguments for cultural protection are largely based on the belief that the production and consumption of cultural products are necessary for the enhancement and development of a national identity and culture. Private consumption decisions do not normally take account of the spill-over benefits to society and hence are likely to lead to insufficient consumption of cultural goods and thus to a consequential detriment to society. An additional argument in support of cultural protection is the notion that taste formation is an endogenous process that can be manipulated by suppliers. Unless people experience certain products they may not develop a taste for them and this too will act to restrict demand for those products below the societal optimum level. Arguments in support of protection based on such beliefs are particularly strong with respect to television programmes.

The validity of these arguments, at least in Australia, has received some credible support. For example, the Industries Assistance Commission in its report on assistance to the performing arts in 1978 acknowledged the existence of sufficient external cultural benefits to justify continued government assistance.

Other characteristics of cultural products also suggest the likelihood of market failure.

- Production of information products, including cultural products such as television programmes, has natural monopoly characteristics. Virtually all the production costs are incurred in producing the first copy.
- Some cultural products, including television programmes, have public good characteristics in that consumption by one person does not prevent consumption by someone else and no additional cost is incurred in allowing additional consumption (for example, a film costs the same to produce irrespective of how many people see it).
- There is also an argument that cultural products have an inherent additional 'cultural value', independent of consumption, and may include such things as aesthetic value, religious value, symbolic value, social value and historical value.

Arguments for assistance to the production of television programmes is partly justified by the information goods nature of television programmes, by the characteristics of an advertiser-financed television market and by external cultural benefits that can accrue from the consumption of domestic programmes.

Production of television programmes, in common with that of information-based products generally, is characterised by very high first copy costs and very low marginal cost. Thus copies of a programme produced in one country can be supplied profitably at very low prices to broadcasters in other countries. Consequently, domestic programmes facing high first copy costs will not be able to compete against the very low marginal cost of imported programmes. Even if

producers take a global market approach, the effect of the 'cultural discount' will disadvantage those in smaller countries.<sup>4</sup>

It may also be argued that, because of the special attributes of cultural commodities, willingness to pay alone is an inadequate indicator of their total value (economic value plus cultural value). For example, Throsby<sup>5</sup> argues that:

- cultural value may exist independently of a consumer's response to a commodity;
- a consumer may have insufficient knowledge about the commodities to make reliable willingness to pay responses;
- some characteristics of culture cannot be expressed in terms of preferences;
- a consumer may be able to recognise cultural value, but may be unable to judge its cultural worth because an appropriate metric does not exist; and
- shared values such as national identity can arise only in a group.

Australia has a long history of providing assistance for cultural activities and related policies appear to attract widespread community support.<sup>6</sup> Widespread support also seems to exist for assistance to the audiovisual sector. Papandrea<sup>7</sup> found that 77% per cent of respondents to a national survey agreed that 'Australian films and television programs improve understanding of our country and way of life' and 71% agreed that 'Australian films and television programs are more meaningful to viewers than imported ones'. Paradoxically, however, the same survey found that only 52.7% of the respondents preferred domestic programmes over imported ones and 48.6% disagreed with the proposition that 'Australian television would be less attractive if fewer Australian programs were shown' (35% agreed with it). These latter findings suggest at least some mismatch between the objectives of the assistance policies and the sector's outputs.

### **Case for Treating Cultural Goods and Services Separately from WTO**

Cultural goods and services do not fit neatly within the established framework of international agreements on trade. The agreements are focused primarily on commercial aspects of trade and markets and generally have difficulty dealing with social policy and other considerations external to the normal functioning of markets. It is not surprising, therefore, that very few countries have been prepared to make substantive offers on cultural services in the GATS context.

As things stand, trade in audiovisual services is nominally subject to the provisions of GATS. The problem, of course, is that most countries are unwilling to make any commitment to liberalise the sector on the basis that it would detrimentally impact on their national identity and culture. France and Canada, in particular, will not entertain any negotiations until a new instrument for special treatment of the sector is developed. Having failed to secure a 'cultural exception' in the WTO context, they have been the main proponents and supporters for the development of a binding UNESCO convention on culture. A question that arises from this is: would such a convention provide a better solution than a special instrument within the WTO framework?

The WTO deals primarily with trade issues and has some well-developed and tested mechanisms to deal with related issues. Cultural products and services do have some special attributes that do not fit well within the trade framework. The existence of such attributes has even been reluctantly acknowledged by the United

States the main proponent for subjecting cultural services to the GATS disciplines.<sup>8</sup> In the past, special arrangements within the GATS have been developed to cater for the pursuit of particular social objectives such as in the case of basic telecommunications services and financial services. Although those cases involved less complex issues and much more limited circumscription of GATS principles than may be required in the case of cultural services, they do demonstrate a capacity to accommodate social policy objectives within the WTO framework.

The main stumbling block to the accommodation of audiovisual services within the GATS framework appears to be a desire from the main proponents of protection to totally insulate those and similar services from liberalisation. For that purpose a very broad meaning is attributed to culture and proponents of protection seek to retain an unconstrained freedom to use protectionist measures in the pursuit of national cultural goals. Free trade proponents, on the other hand, are concerned that an unconstrained exclusion could be misused to extend protection to all kinds of activities under the guise that they have a cultural link. For example, the tendency to link all so called 'creative industries' with culture is a cause for concern in this regard. In addition to traditional film and television production, audiovisual services include all forms of new electronic media and online services some of which are currently thriving without any explicit form of protection. For example, the development of electronic games has emerged as a thriving activity in Australia and much of its output is destined for the international market. It would be inappropriate to attempt to justify assistance to such activities on the basis of a tenuous link that creativity is a critical element of all cultural activities.

Even within the more traditional audiovisual sector, while many services have undoubted cultural attributes, it would be difficult to sustain such a claim in relation to all audiovisual services. Some, such as post-production services, animation and computer software, for example, could hardly be argued to be much more than industrial services with few, if any, specific attributes that would make them highly relevant to national culture and identity. They are primarily commercial products whose production does not depend on local culture and could be undertaken effectively anywhere in the world. For other services, such as television programmes and movies, there is arguably a stronger link to cultural development. Thus, while a case for special treatment can be made for some audiovisual services, treating all audiovisual services as being critical to cultural development would clearly be overkill.

To differentiate between culturally relevant and other audiovisual services a systematic and detailed classification system needs to be developed and agreed to. At a broad level services could be assigned to two categories on the basis of whether they are 'primarily commercial audiovisual services' or 'primarily culturally relevant audiovisual services'. Those falling within the primarily commercial category could be subject to standard GATS disciplines and the 'culturally relevant audiovisual services' would be covered by some specially negotiated arrangements. This approach would be similar to the WTO agreement on telecommunications services, where special arrangements are related to basic services that may be relevant to a nation's social policy objectives.

The WTO agreement on basic telecommunications services, which is generally enforceable through the WTO dispute resolution procedures and, in particular circumstances, through specific mechanisms established by a country as part of implementation of the agreement, comprises three principal elements:

- the provision of access to the domestic telecommunications market of a signatory country to telecommunications operators established in other WTO member countries;
- allowing significant foreign ownership or control of telecommunications services and facilities in a signatory country; and
- the establishment of a framework for fair competition in the telecommunications market in a signatory country based on set regulatory principles defined in the telecommunications 'Reference Paper'.

The provisions of the Reference Paper in particular, deal with issues that have some similarities to those encountered by cultural policy. The Reference Paper seeks to establish a balance between trade liberalisation and social policy objectives.<sup>9</sup> For example, one of the major provisions of the Reference Paper establishes the right of a member country to define the kind of universal service obligation it wishes to maintain.<sup>10</sup> The obligation defined by a member country is not regarded as anticompetitive *per se*, provided that the requirements 'are administered in a transparent, non-discriminatory and competitively neutral manner and are no more burdensome than necessary for the kind of universal service defined by the Member'.<sup>11</sup> Although universal service obligations for telecommunications services are different from instruments such as quota restrictions on the entry of foreign audiovisual products in a domestic market, the provisions of the Reference Paper do indicate that there is scope to accommodate social policy objectives within GATS.

According to Messerlin,<sup>12</sup> 'GATS Article VI contains all the "seeds" needed for drafting a Reference Paper' on audiovisual services. In particular he draws attention to the article's requirements for domestic regulation to be based on 'objective and transparent criteria' and be 'not more burdensome than necessary', and the importance it gives to the establishment of dispute settlement procedures providing for 'prompt review' and 'appropriate remedies'.

The development of a special instrument on audiovisual services would need to devote some attention to the definition of permissible protective instruments and of the condition for their use. In particular, it would need to cater for the main elements of existing protective arrangements, namely:

- rules of origin;
- quotas; and
- subsidies.

Rules of origin must be clearly defined for an effective GATS instrument. Currently, the GATS does not contain any definition of rules of origin. The current Australian regulation for film and television programmes uses a 'creative control' test based on the nationality of key production personnel (director, producer, cast, etc.) and the location of the production and post-production activities. Thus anything that is made in Australia, irrespective of its cultural relevance (be it an Australian story or not) is classed as being Australian, provided the requisite Australian inputs are used in the production. In part, this definition is a recognition of the difficulty of defining nationality on the basis of cultural attributes, but it is also partly revealing of the industrial (rather than cultural) protection origins of the regulation.

Some of the difficulties confronting a cultural definition of the nationality of television programmes in a trade context were discussed in a judgment by the High



Court Australia in relation to programmes produced in New Zealand with which Australia has a free trade agreement.<sup>13</sup> By virtue of that judgment, New Zealand-produced programmes qualify as 'Australian' for the purpose of the regulation. Australian status is also granted to films or television programmes produced as part of bilateral co-production agreements. While those agreements are excluded from GATS coverage, they do highlight the need for a clear, if not precise, definition of rules of origin.

Quotas, such as those used by Australia and other countries to ensure minimum levels of domestic programming on free to air television, are prohibited by GATS Article XVI unless they are specified in a country's initial offer for market access. There is an expectation, however, that quotas included in a country's market access schedule will eventually be reduced or eliminated as part of progressive further market liberalisation. If a more enduring authorisation of quotas is necessary, Article IV of GATT authorising cinema screen quotas provides a precedent that could be adopted in a special GATS instrument for audiovisual services.

Agreement on the use of content quotas in the pursuit of cultural policy objectives is likely to be the biggest stumbling block to a special instrument on audiovisual services. Major exporters are opposed to quotas. Several countries (for example, Australia, Canada, France and the European Union generally) are equally committed to their retention. Without a practical compromise on the continued use of quotas, agreement on a special cultural instrument is unlikely to be reached.

A compromise solution will not be easy to formulate. However, the recently negotiated Australia–United States Free Trade Agreement, which provides for a standstill arrangement for current quotas and allows their limited future extension to new media services, such as multi-channelled free to air television services, suggests that there could be scope for compromise.<sup>14</sup> An appropriate compromise, for example, might be to bind future market access for all services (including new technology-based services) to be no more restrictive than that applicable to current services.

Article XV of GATS permits the use of subsidies that do not have distortive effects on trade in services. Members are required to enter into negotiations to develop the 'necessary multilateral disciplines to avoid such trade-distortive effects ... (and) address the appropriateness of countervailing procedures'. It also provides that members adversely affected by a subsidy may request consultation on the matter. Affected members also have recourse to the dispute settlement and enforcement provisions set out in Article XXIII. Existing subsidies listed in a member's market access schedule are not affected. As Article XV provides little guidance on the use of subsidies for cultural purposes, it would be desirable to develop specific rules on their appropriate use for such purposes and incorporate them in a special cultural instrument.

### **UNESCO Convention on Cultural Diversity**

On 17 October 2003 the 32nd session of the General Conference of UNESCO decided that 'the question of cultural diversity as regards the protection of the diversity of cultural contents and artistic expressions shall be the subject of an international convention' and invited the Director General to submit to the General Conference at its 33rd session a preliminary report on the scope of the proposed regulation together with a preliminary draft of the convention. This was preceded

by the UNESCO Universal Declaration on Cultural Diversity, which was adopted on 2 November 2001.

UNESCO's intervention was promoted vigorously by the International Network on Cultural Policy (INCP), which was set up in 1998 to bring together culture ministers from participating countries that were seeking to exclude cultural services from WTO coverage. The French and Canadian Governments strongly support the INCP and are the most enthusiastic promoters of a new instrument on cultural diversity outside the WTO. A related International Network for Cultural Diversity (INCD) was established as an international non-government organisation (NGO) to complement and support the INCP's efforts. INCD's membership includes individual artists, producer and other industry representatives, lobbyists and non-government cultural organisations.<sup>15</sup>

The proponents of a convention on cultural diversity outside the WTO argue that trade agreements weaken the right and the ability of a country to implement domestic policies for the preservation of cultural diversity and enhancement of a national identity and culture. Consequently, they argue that an international convention is needed to preserve a country's rights to pursue whatever policies it deems necessary for the promotion of cultural diversity.

Australia has a long history of regulatory intervention in the audiovisual sector. Minimum quotas for domestic programming for radio were first set in the late 1940s requiring the broadcast of Australian music, and in 1960 for Australian television programmes. With such regulatory credentials in support of domestic programming, Australia could be expected to have been a natural candidate for membership of the INCP. Yet it has never been a member of INCP, nor has it shown any inclination to become one, despite urgings from industry groups to do so.<sup>16</sup> Although there are no official statements of reasons for not joining the INCP, there are suggestions that the Government regards INCP membership as a potential constraint on its flexibility to accommodate an independent domestic cultural policy in its external trade relations.

Notwithstanding its unwillingness to join the INCP, Australia has not made any GATS commitments for market access in relation to audiovisual services and has taken a strong stand against general liberalisation of the sector. The position against liberalisation of the sector is justified on the basis that the Australian regulatory interventions are directed to the pursuit of cultural policy objectives. Australia's position was summarised at the Special Session of the WTO Council for Trade in Services in July 2001 as follows:

Australia remains committed to preserving our right to regulate audiovisual media to achieve our cultural and social objectives and to maintain the broad matrix of support measures for the audiovisual sector that underpin our cultural policy; including retaining the flexibility to introduce new measures in response to the rapidly changing nature of the sector.<sup>17</sup>

A similarly strong stance was adopted in the recent negotiations for the Australia–United States Free Trade Agreement.

The film and television production industry has been undertaking concerted, very public and successful lobbying in support of television content quotas and other assistance since the 1960s. Until a decade or so ago, advocacy for special assistance and protection was primarily linked to industry development and job creation for 'artistic talents'. With the progressive liberalisation of the Australian



economy since the early 1970s demands for industry protection have become less sustainable and the emphasis of arguments in support of assistance to the audiovisual sector has shifted to highlight their link with the promotion of national culture and identity.

Pressure for assistance to the audiovisual sector has all the hallmarks of rent seeking by vested interests. The industry lobbying efforts are well organised and coordinated bringing together all the various elements of the sector that are likely to be the beneficiaries of the assistance. In more recent times the various industry groups (producer associations, guilds, unions, artists, etc.) have formed a loose coalition (the Australian Coalition for Cultural Diversity) that has been actively opposing any liberalisation of existing protection and has been arguing for its extension to all creative activities. It is not surprising, therefore, that the strongest supporters for a UNESCO convention on cultural diversity should be found among members of the 'coalition'. They are also strongly urging Australian membership of INCP.

Given their functions, government agencies such as the Australian Film Commission (film development agency) and the Australia Council for the Arts (arts funding and advisory agency) are supportive of existing measures of assistance to the audiovisual sector. The Australian Film Commission<sup>18</sup> has adopted a position similar to that of the Australian Coalition for Cultural Diversity in support of a UNESCO convention on cultural diversity Government membership of the INCP. Although the Australia Council also advocates the retention of Australia's capacity to provide assistance to domestic cultural development, its preference seems to be the development of a GATS cultural instrument or annex.<sup>19</sup>

Industry interests are vigorously opposed to any changes to arrangements that may dilute existing levels of assistance or potentially weaken the capacity to provide further assistance to the industry, including assistance to new technology-based services. Even changes with potentially little consequential impact on the industry are strongly opposed. For example, in the late 1990s some New Zealand television production interests used the provisions of the Australia New Zealand Closer Economic Relations (CER) Agreement, which binds the two countries to treat each other's services no less favourably than their own, to seek non-discriminatory treatment of New Zealand-produced programmes under the Australian domestic television content rules. Notwithstanding rational analysis that approval of the claim would have had negligible impact on Australian television content, the request was vigorously opposed by Australian production industry interests with an alarmist campaign predicting decimation of the industry and devastation of Australian national culture.<sup>20</sup> The New Zealand request was rejected by the Australian Broadcasting Authority (the broadcasting regulator), but following reversal of the regulator's decision by a lower court, the case was appealed to the High Court of Australia, which ruled in New Zealand's favour. Since its implementation, the decision has had virtually no impact on Australian television content.

Production industry interests also mounted a strong campaign against any concessions in the audiovisual sector in the recently negotiated Australia–United States Free Trade Agreement. In the negotiations Australia – secured a 'standstill' agreement on current protection measures plus preservation of the right to implement limited (prescribed) additional interventions for multi-channel free to air television and pay television, and impose measures to ensure that Australian content on interactive audio and video services 'is not unreasonably denied to Australian consumers' following a finding by the Government that such content is

not readily available. Nonetheless, major industry groups and unions claimed that the outcome 'threatens significant losses to Australian culture'.<sup>21</sup>

While industry interests have been able to project a united and effective front in the pursuit of protection for more than 40 years, there are some feeble signs that consensus could be threatened in the years ahead. For example, individuals engaged in the development of electronic games for the international market are not dependent on local assistance and may be reluctant to support special treatment of other audiovisual activities. There are also signs that different parts of the production industry disagree about the growing level of foreign production activity in Australia. There are those who favour increased foreign production activity because of its positive effects on economic activity and employment, but there are also those who fear that such growth could threaten continued support to local activities.<sup>22</sup>

With the signing of the Australia–United States Free Trade Agreement, Australia's audiovisual assistance policy is all but settled.<sup>23</sup> The United States is the source of the overwhelming majority of audiovisual imports into Australia. Having settled an agreed level of domestic support for domestic audiovisual production with by far the most important foreign competitor in the local market, there would be little gain for Australia to pursue more restrictive policies with regard to imports from other countries. Under these circumstances it is difficult to see what attractiveness, if any, a UNESCO convention on cultural diversity would have to Australian policy makers.

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