

Australia US Free Trade Agreement (AUSFTA) and the Audiovisual sector

The AUSFTA was signed by the US and Australia in mid-May. Nick Herd looks at the results of the negotiations for the audiovisual sector and whether they accommodate Australia's cultural and social policy objectives.

Like most nations Australia has a hefty trade imbalance in audiovisual with the US. In 2001/02 Australia received \$A518 million worth of film and television imports from the US and in return exported a mere \$A10 million. Like most nations Australia also has in place a raft of measures designed to support audiovisual production so as to achieve cultural outcomes.

Yet going into the free trade negotiation with Australia the US audiovisual sector was keen to see Australia limit or remove those government measures, which it argued were barriers to trade. Just as keen was the Australian audiovisual sector to see those measures retained, along with the freedom of the Australian government to act in the future as new audiovisual media developed. In response the Australian government said it wanted to ensure the negotiations took account of 'the need for appropriate regulation and support measures to achieve these [cultural policy] objectives in areas such as audiovisual media'.

At the end of negotiations there is compromise. The Australian government has agreed to constrain its flexibility to act, yet the US has not achieved the complete liberalisation its industry desired.

The AUSFTA is structured so that both parties agree to remove barriers to trade across a broad sweep of the economy. But this is subject to various exceptions and reservations, which are the means by which compromise is reached.

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

The regulation cannot be increased beyond current levels and 'ratchet provisions' mean any change must wind it back. The same applies to foreign ownership rules for broadcasting in both countries.

In other areas where Australia has reserved the power to act these 'ratchet provisions' do not apply. Among these are:

- Maintenance and extension of co-production treaties.
- Multichannelled free-to-air commercial television broadcasting services – allows the application of Australian content requirements to up to two additional channels and seemingly also to rebroadcast channels.

- Subscription television broadcasting services – allows the increase of the current 10% expenditure requirement on drama channels to 20%.
- Interactive audio and/or video services – allows for the introduction of new measures for local content where the Australian government determines they are necessary.
- Taxation concessions for investment in Australian cultural product.

Interactive audio and/or video services are not defined in the agreement, but seem to cover the majority of likely new services. However, the Australian government can only act to ensure Australian content on these services is 'not unreasonably denied' to Australians and can only act in relation to businesses in Australia. In practice this test for regulatory action may be hard to meet and difficult to have effect in a globalised system of content distribution.

As well as taxation concessions, government grants and subsidies have been exempted from the application of the services and investment chapters. This covers part of what the government provides in the way of assistance to audiovisual production. However, a large part of this assistance is also provided by way of investment in intellectual property, such as through the Film Finance Corporation. It would appear that such investment has not been reserved, although this may be an unintended consequence of the drafting.

There is no specific reservation for the ABC or SBS, but there is a general reservation for a 'service supplied in the exercise of governmental authority', but such a service cannot be supplied 'on a commercial basis, nor in competition with one or more service suppliers'. There may well be many aspects of the services supplied by the national broadcasters that are done so on a commercial basis and in competition with other service suppliers, for example, the ABC's retail and online services. In practice this may not be a problem, but it leaves an area of uncertainty.

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

Australia has also conceded considerable ground to the US over e-commerce by agreeing to the wide-ranging definition of digital products promoted by the US. This definition captures most services and products that are digitised, certainly all audiovisual existing now and in the future, and subjects them to higher standards of liberalisation than those that apply to cross-border trade in services and investment

generally. The Australian government has ensured that this does not apply to the current audiovisual measures it has reserved (as described above). However, the longer term implication is that any new or existing form of audiovisual media that does not meet the terms of these reservations will be subject to the e-commerce chapter.

The agreement is now the subject of consideration by two Parliamentary committees in Australia and will also be considered by the US Congress. The agreement will come into force when both nations advise each other their domestic approval processes are complete, probably early 2005.

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