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**Abstract**

The text of the Australia-US Free Trade Agreement (AUSFTA) released in early March 2004 makes more concessions than many in Australia’s audiovisual and cultural industries might have hoped, but less than they feared. Its precise impact will depend on how ‘new media’ replaces, subsumes or supplements ‘old media’, and how quickly. AUSFTA institutionalises much lower aspirations about the level of Australian content in emerging media systems than Australians have come to expect in broadcast television. Some will interpret this simply as an articulation of the policy impotence which will inevitably flow from technological change. Others will recognise it as a partial, but historic, concession of Australian policy capacity and a broad acceptance of the long-standing US agenda for the information economy - long and tough protections for intellectual property rights, but increasingly liberal global markets for trading them. This article explains the provisions of AUSFTA and examines their effect on Australian audiovisual and cultural activities.
‘Not unreasonably denied’: Australian content after AUSFTA

Overview

After a little over a year of negotiations, the draft text of a free trade agreement between Australia and the United States was released in early March 2004. A bilateral trade agreement between Australia and the United States was always going to require concessions from Australia about audiovisual and cultural industries. Limiting such concessions was, according to chief negotiator Stephen Deady, one of Australia’s four most important ‘defensive’ interests in the negotiation.

AUSFTA introduces new constraints on the ability of all levels of government in Australia to maintain and adopt policy measures to support audiovisual and cultural industries and activities. Although in some areas it is not as constraining as the Closer Economic Relations agreement already existing with New Zealand (CER), it is much more limiting than the bilateral free trade agreements signed in 2003 with Singapore (SAFTA) and Thailand (ATFTA). It does not contain any provisions which seem likely to result in any appreciable increase in Australian audiovisual and cultural exports to the US.

The Australian Government says the key aspect of the AUSFTA is ‘the maintenance of Australia’s right to intervene in response to new media developments, subject to a number of commitments on the degree or level of any new or additional local content requirements’. The outcome, it argues, ‘provides benefits to the US, in the form of guarantees that Australia will not, at some point in the future, become a market that is closed to foreign audiovisual material’, while safeguarding Australia’s right ‘to intervene in response to new developments in media platforms, including the right to introduce new local content requirements’. (‘DFAT Audiovisual Outcomes’)

This article explains the provisions of the draft text of AUSFTA and examines their effect on Australian audiovisual and cultural activities.

The big picture: why Australia did it

Australia saw both direct and indirect advantages in a free trade agreement with the US. The government commissioned economic modeling in 2001 which showed Australian GDP would eventually increase 0.33 per cent and US GDP 0.02 per cent if all trade barriers between the two countries were removed. (Centre for International Economics) Now that the draft text has been released, the same economic modelers have been commissioned to reassess the net economic impact. The deal actually done leaves in place some barriers whose removal was very important to the overall gains for Australia (eg. sugar), or removes them only over a long period (18 years in the case of beef). The government concedes that any direct economic gains from the agreement are not as great as they had hoped. (Deady) Others have suggested that they may be negative, or at least that the Productivity Commission be called on to do the reassessment. (Wood) This begs the question of whether the acknowledged costs
of the agreement for Australia in areas like audiovisual and intellectual property were justified by the gains made elsewhere.

Much emphasis has been placed on the indirect advantages which might not be captured in economic models. An OECD report says bilateral trade agreements in general are about political and strategic objectives as much as economics. (Heydon) A report commissioned by the government in 2001 to assess the wider implications of a Australian-US agreement placed great emphasis on the benefits that would flow to Australia from a deeper relationship with the US. (Australian APEC Study Centre) With a population of around 300 million, an economy making up a third of the global economy, world leadership of the Information Economy, and its status as Australia’s largest trading partner and investment partner, the US was the economy with which Australia needed to build a closer and deeper relationship. After the announcement of the deal, Paul Kelly said the real argument for its approval was that it would ‘make Australia a more globalised economy and nation’. Supporters of this view argue that investment is at least as important for long term export performance as cross border trade in goods and services, and investment comes from strong, close relationships.

Another major reason some are supporting a less-than-perfect agreement is the lack of progress in multilateral trade liberalisation through the World Trade Organisation. A country like Australia, whose governments since the mid 1980s have seen its economic interests best served by open global trade, has to get its liberalisation wherever it can. Says Stephen Deady, ‘There are things you can do in [bilateral] free trade agreements that you can’t do in Geneva [where the WTO is headquartered], things we can talk about and a depth we can talk about them in. Services, investment, you can’t talk about those things in Geneva with 146 countries…The US will not do things in Geneva where it sees other countries free-riding.’ While Australia and the US still insist that multilateral trade liberalisation is their top priority (Vaile; Zoellick Doha), the reality is that bilateral and regional deals are where the action is. Fifteen years since the end of the Cold War, a decade on from the new global trade regime settled at the end of the Uruguay Round, and two years after the September 2001 terrorist attacks, the trend towards ‘preferentialism’ reflects the current impossibility of some forms of globalisation.

Joining this trend carries risks. Ross Garnaut, a confirmed multilateralist who advised the Hawke/Keating government on its program of tariff reductions in the 1980s, says ‘The excitement about bilateral and regional FTAs has starved the multilateral trade negotiations of oxygen…For the first time, Australia has conceded the legitimacy of significant agricultural exclusions from bilateral FTAs.’ Others note that AUSFTA does not cover temporary and permanent immigration. This means the opening of US markets for government procurement and services might be illusory, because of impediments to the movement of Australian business people into the US to support any contracts that might be won. Then there is the much broader question of the strategic cost of Australia’s high profile relationship with the US, a question which attracted much political heat after comments by the Commissioner of the Australian Federal Police in March 2004 linking Spain’s role in postwar Iraq with Madrid terrorist bombings on 11 March. (Dow Jones)
What was done

AUSFTA establishes a regional free trade area of the kind allowed under WTO rules. It comprises:

- a preamble setting out the broad ideas motivating the agreement;
- 23 chapters covering general principles, obligations and exemptions; specific rules for some sectors; procedures for the settling disputes; and administrative provisions about commencement, review, modification and termination of the agreement;
- separate country annexes detailing ‘non-conforming measures’ which may be maintained or adopted.
  - Annex I lists current measures, which can be maintained or ‘reduced’ (amended so as not to ‘decrease the conformity of the measure’) – implying a ‘racheting’ downwards;
  - Annex II lists sectors, sub-sectors or activities where broader flexibility is retained to introduce new measures or adapt existing ones;
- sideletters clarifying the application of a provision, making additional commitments applying only to one country, or confirming the operation of existing policies or systems.

The main parts of the agreement which affect audiovisual and communications industries are Chapters 10 (Cross Border Trade in Services), 11 (Investment), 12 (Telecommunications), 16 (Electronic Commerce), 17 (Intellectual Property), 21 (Institutional arrangements and dispute settlement), 22 (General provisions and exceptions, including taxation), Annexes I and II (both Australia’s and the US’), the exchanges of letters on Aspects of Intellectual Property, Foreign Investment Review Board, Immigration Measures, ISP Liability, National Treatment – Phonograms, Telecommunications Consultative Mechanisms, and the Letter from Australia on the Privatisation of Telstra.

What it means for audiovisual and cultural activities

There are four broad areas of impact for audiovisual and cultural activities: cross border trade in services, investment, electronic commerce and intellectual property.

Cross border trade in services

The agreement adopts the ‘top-down’ or ‘negative list’ structure of CER and SAFTA. This means the central obligations under the agreement generally must be accepted in all areas of the economy except those where the US and Australian governments separately choose to list ‘non-conforming measures’. Those obligations are to treat US companies, goods and services no less favourably than those from other countries (‘non-discrimination’ or ‘Most Favoured Nation’) and no less favourably than those from Australia (‘national treatment’), and to offer ‘Market Access’. It is a crucial structural distinction from the WTO General Agreement on Trade in Services. Under that agreement, countries are only required to offer most-favoured nation, national treatment and market access in the areas where they choose to list ‘commitments’ – a
‘positive list’ approach. Australia and most other countries have made no commitments in broadcasting and audiovisual services in the WTO. Under AUSFTA, all non-conforming government policy measures not listed in the Annexes must be removed.

**Quotas**

Australia has reservations in both Annex I and II which affect its ability to maintain and adopt quotas. It can retain its existing commercial television transmission quotas. These require 80% of advertising and 55% of programs to be Australian, and minimum amounts of adult and children’s drama and documentary (‘subquotas’).

(Annex I-14) Similar quotas can be imposed on at least one, and a maximum of two, further free-to-air ‘multichannel’ services provided by a commercial operator. If current policy changed to allow commercial operators to offer multichannel services using their digital capacity, the practical impact, given existing technology, is that 2-3 of the 4-5 services each operator could offer would have to be quota-free. (Annex II-6(a)) Where a quota channel is rebroadcast over another transmission platform or moved to another platform, the same quota can still be applied. (Annex II-6(b) and (c))

The agreement also allows domestic content quotas for commercial radio of up to 25%. Currently, local music targets up to this level are set in the commercial radio industry’s codes of practice though not in the more immediately-enforceable Australian Broadcasting Authority (ABA) standards which apply to television programs. (Annex II-7(e))

Subscription television broadcasting (pay TV) services are currently required to spend 10% of the program budgets of drama and general entertainment channels on new Australian drama. The agreement would allow this requirement to be increased to 20% (a change already formally rejected by government), and a 10% requirement to be imposed on some new channel genres – arts, children’s, documentary, educational. Because of the high relative cost of Australian programs, however, the 10% requirement is currently only delivering a much smaller proportion of the transmission time of affected channels. (Annex II-6 to II-8)

Australia’s right to introduce local content requirements (though not all other policy measures) on ‘new media’ services is tightly circumscribed. Measures can be imposed on ‘interactive audio and/or video services’, but only so as to ensure Australian content or genres are ‘not unreasonably denied’ to Australian consumers, and only on companies that carry on business in Australia. (Annex II-6 to II-8)

The four elements of the limits to quota-style measures on ‘new media’ are worth exploring. First, the definition of the services to which measures may be applied, ‘interactive video and/or audio services’, appears to cover most forms of internet, mobile and video-on-demand services but not digitally-delivered ‘e-cinema’. Even if the delivery of cinema services to customers is still done in the future by a local service provider, there may be no interactivity involved. ‘Datacasting’, as currently defined under the Broadcasting Services Act, would be covered to the extent that it was interactive, but not to the extent that it wasn’t. (see Section 6 and Schedule 6)
This is potentially significant given the broadcast-style content which is able to be transmitted under a datacasting licence. (Williams, 17 March 2004)

Second, ‘measures to ensure that...Australian audiovisual content or genres...is not unreasonably denied to Australian audiences’ – may be a very tough test to satisfy. One might argue, for example, that Australian material is already ‘not unreasonably denied’ to television audiences in the US, despite its very low visibility. In the future, Australian material might be technically available to Australian audiences online via servers, but the search engines and electronic program guides generally used to make viewing/using choices might not readily lead the user to it.

Third, the combined effect of the Chapter 10 prohibition on either party requiring the establishment of a Australian commercial presence to undertake any particular activity (Article 10.5) and the Annex II commitment only to apply any new measures to companies carrying on business in Australia, means that services directly transmitted from outside Australia without any local presence cannot have even the measures of the kind referred to in Annex II imposed.

Fourth, there are procedural pre-conditions to any expansion of the pay TV quotas or introduction of measures affecting interactive services. Although the language of these sounds very tough, they are similar to the ABA’s existing consultative requirements.

Overall, the market share targets – 80% of advertising, 55% of TV programs, 25% of radio programs, 20% of pay TV drama expenditure, 10% of pay TV arts, children’s, documentary and educational program expenditure, and ‘Australian content and genres ‘not unreasonably denied’ on interactive media – show the declining aspirations about the level of Australian content in emerging media systems.

The constraints on future policy-making flexibility which Australia has accepted in this area are greater than those it has accepted in its free trade agreements with Singapore and Thailand, but less than those it has accepted under CER with New Zealand. CER generally requires Australia to treat New Zealand services, including TV programs, no less favourably than Australian ones. Since 1999, New Zealand programs have been able to qualify for Australian content quotas. When reviewing the quotas in 2001 and 2002, the Australian Broadcasting Authority concluded that the inclusion of New Zealand in the standard ‘did not appear to have had any appreciable impact on the broadcast of Australian programs on commercial television’ (Australian Broadcasting Authority: 49). New Zealand, however, is a much smaller audiovisual producer than the US, and the Australian networks have all resisted being the first to tempt the ire of the local production industry by commissioning a New Zealand-based show for domestic quota purposes.

**Subsidies, grants and tax concessions**

Unlike quotas, subsidies and grants affecting services, investment and electronic commerce are able to be maintained without identifying them in the Annexes. (Articles 10.1.4(d), 11.13.5(b) and 16.4.3(c)) Although certain kinds of taxation concessions might otherwise be subject to the obligations under the agreement, Australia’s Annex II reservation allows it to maintain or adopt ‘taxation concessions
for investment in Australian cultural activity where eligibility for the concession is subject to local content or production requirements’. This includes existing culturally-motivated tax concessions, such as Division 10BA and 10B of the Income Tax Assessment Act which support investment in Australian film and television productions, and the refundable tax offset established to encourage big budget feature film production and post-production in Australia. The Department of Foreign Affairs and Trade also says the Annex II reservation would be sufficient to allow tax concessions to be extended to other forms of audiovisual production. (pers comm., 16 March 2004) This might, for example, include electronic games.

A problem, however, is that much of the direct federal and state government support for individual film and TV projects is provided not by way of subsidies and grants, but as investments in intellectual property assets. Both subsidies and grants and investments are subject to performance requirements which limit the kinds of local content obligations that can attach to them. This is discussed further below under ‘Investment’.

Public services and enterprises

Another common government policy measure which is excluded from the coverage of the cross border trade in services and electronic commerce chapters is ‘services supplied in the exercise of government authority within the territory of each respective party’. (Article 10.1.4(e) and 16.4.3(d)) These are defined as ‘any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers’. The effect is that the Parties are not obliged to accord the elements of the services chapter (national treatment, most favoured nation, market access) and the electronic commerce chapter (most favoured nation/national treatment, see below) in relation to services which fit this definition.

The Australian government explains the implication of this as ‘The AUSFTA will not affect the ability of either Party to provide public services, including in relation to cultural activities, such as public broadcasters (ABC and SBS), public libraries or archives’. However, the definition of ‘services supplied in the exercise of government authority’ might not include all the services supplied by some organisations which are generally thought of as ‘public agencies’. It would appear to include, for example, the services provided by the National Film and Sound Archive, the Australian Centre for the Moving Image and the Australian Film Institute. It is more difficult to see it covering all aspects of the ABC’s services (such as music recording, book publishing, ABC shops), very difficult to see it covering all the SBS’ services (such as subtitling services and especially the sale of commercial television airtime) and impossible to see it covering all aspects of the Commonwealth-owned production, distribution and facilities company, Film Australia Pty Ltd.

The definitional problem exists already in the WTO/GATS, from which the definition is taken, but it has limited impact there because of the ‘positive list’ structure of the agreement. Few countries have made commitments about broadcasting so as to limit their ability to maintain and adapt public service broadcasters and other public enterprises. Under AUSFTA, however, the problem has immediate impact because measures affecting services which don’t comply with the obligations of national treatment, MFN and market access can only be maintained if they are expressly
identified the Annexes as ‘non-conforming’. Australia has not taken out any reservations in this area.

Still, the practical implications of this interpretation might not be great. The services that matter most to policy, free-to-air TV and radio, can be argued to fit the definition because the special charters of the ABC and the SBS mean their free-to-air offerings are neither commercial nor competing with commercial services. After AUSFTA, the public broadcasters might not be free to impose local purchasing preferences or local content targets in other areas like music recording, book publishing, ABC shops, subtitling services and the sale of commercial television airtime, but they may not wish to. It is, however, an argument that governments and their public enterprises might prefer not to have with American trade negotiators acting on behalf of potentially aggrieved US service providers. It is a thorny area open to unintended consequences, if ‘public agencies’ find themselves unable to retain operational policies which previously seemed unremarkable and irrelevant to trade negotiations.

Other areas

Australia’s capacity to retain and adopt several other common audiovisual policy instruments is preserved in various ways: international co-production agreements providing preferential treatment for projects co-produced between Australia and certain other countries (Annex II-9), support for indigenous people and enterprises (Annex II-2), telecommunications universal service arrangements (Article 12.18), and limits on spectrum allocation which restrict the number of service suppliers (such as the existing restriction on more than three commercial TV services in a market) or which require ‘specific types of legal entity or joint venture through which a service supplier may supply a service’ (for example, non-profit corporations, which are the only kinds of entities which can hold community broadcasting licences). (Annex II-7) The US has also preserved its ability to adopt certain measures about spectrum allocation. (Annex II-3) The agreement as a whole does not impose any obligations on the parties regarding their immigration measures. This means the existing arrangements for temporary migration into Australia for work on film, TV and other cultural work are not affected. (Article 10.1.5, Exchange of Letters on Immigration Measures)

Investment

AUSFTA goes well beyond existing commitments in CER, SAFTA, ATFTA and the WTO in this area. It requires substantial liberalisation of Australia’s existing foreign investment regime across the whole economy, broadly removing the need for Foreign Investment Review Board notification of proposed investments in Australian companies with assets of up to $800 million. In the media and telecommunications sectors, however, Australian reservations preserve the existing broadcast, newspaper and Telstra limits. They also preserve the requirement for notification and ‘national interest’ scrutiny under the Foreign Acquisitions and Takeovers Act of all direct media investments irrespective of size, portfolio media investments of 5% or more, and all investments in telecommunications businesses with total assets of more than $A50 million. There is no capacity to introduce new limits and a ‘ratchet’ provision on existing measures means that any reduction or removal of these limits would be
Although the agreement does not require any change to the current majority Commonwealth ownership of Telstra, the Letter from Australia on the Privatisation of Telstra confirms the present government’s ‘long-standing commitment’ to full privatisation. It says responsibility for the corporation’s business decisions rest with its Board, and the government (meaning all future governments) ‘will continue to ensure that its interest in Telstra does not affect...regulatory independence’.

AUSFTA also sets important new restrictions called ‘performance requirements’ on government measures imposing local content, purchasing or similar obligations on individual foreign investors and investments. This could include Melbourne’s Docklands, Sydney’s Fox and Warner Roadshow’s Gold Coast studio complexes, depending on the precise legal form of any government support. Broadly, existing State government measures can be retained, though not made more onerous. As existing contracts or perhaps legislative provisions expire, an important question will be whether the renewal of existing arrangements represents a new or grandfathered measure. For new measures, requirements such as domestic content, export, local purchasing or technology transfer requirements cannot generally be imposed on investors. However, the ‘receipt of an advantage’ in connection with an investment can be made conditional on compliance with a requirement to ‘locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development’. This appears to require any ‘local’ obligations to be cast in more general and less specific, measurable terms than may currently be the case. (Article 11.9)

As noted earlier, a critical implication of the investment chapter comes from the inclusion of investments in intellectual property in the definition of ‘investments’. (Article 11.17.4(f)) Much of the direct financial support provided to film, TV and multimedia projects by film agencies is directed not as grants and subsidies, but as investments in intellectual property. This occurs with development and production deals, where the agencies acquire rights and earn returns, and, for SBS Independent, which acquires broadcast rights.

Investments of this kind, as well as grants and subsidies, are subject to the restrictions on ‘performance requirements’. Although, as noted above, certain kinds of performance requirements can be imposed to condition the ‘receipt or continued receipt of an advantage’ in connection with an investment, (Article 11.9.3) other kinds of requirements cannot. In particular, a requirement ‘to achieve a given level or percentage of domestic content’ can’t be imposed (Article 11.9.2(a)). This would appear to preclude the kind of local content test covering subject matter, place of production and post-production, source of finance, copyright ownership and personnel, which is a precondition for Film Finance Corporation and Australian Film Commission investment.

The implication is that, without additional wording in Australia’s Annex II reservations, the most common form of film and TV ‘subsidy’ may in practice be
constrained, not unconstrained as argued by the government. At the time of writing, this was an issue attracting attention from government.

**Electronic commerce**

Chapter 16 of AUSFTA is an expansive provision based on the models in the US free trade agreements with Singapore and Chile. It is designed to ensure that local content obligations and customs duties cannot be imposed on physical (e.g. CD’s, DVD’s, games) or electronically delivered (e.g. broadcast, mobile telephone, online) digital products.

Broadly, it prevents local content requirements being imposed on suppliers of ‘digital products’ other than those identified under the Annex I and II audiovisual and broadcasting services and other reservations. (Article 16.4.4) This means, in particular, that the ability Australia has retained to impose quota-like measures on ‘interactive audio and/or video services’, discussed above, is not compromised by wider obligations which would otherwise have been imposed under the Electronic Commerce chapter. ‘Digital products’ extends well beyond media, communications and cultural products, to include ‘the digitised form, or encoding of, computer programs, text, video, images, sound recordings and other products, regardless of whether they are fixed on a carrier medium [a physical product] or transmitted electronically’. (Article 16.8)

The relationship of this chapter to other parts of the agreement is complex and confusing. Its inclusion responds to the strong US desire for wording that articulates its ambition for markets in new media and other products to evolve without the government interventions which have been so common in the markets for film since the 1920s and television since the 1950s. The confusion comes from the creation of a new category of ‘digital products’, which can be either goods or services, and thus blurs the long-established distinction between these categories in trade agreements. However, Chapter 16 goes on to exclude ‘the supply of a service employing computer processing’ from its coverage. According to the Australian government, the means ‘services delivered electronically remain just that – services. The purpose is to emphasise that if a service – such as an architectural consultancy or a university degree by coursework – is delivered electronically (such as by email, or online), it should not be treated any differently than if it was delivered by post or in person’. (DFAT Guide to AUSFTA) Even more confusingly, the chapter states that the definition of digital products is ‘without prejudice to the on-going discussions at the WTO on whether trade in digital products transmitted electronically is trade in goods or trade in services’. (Note 16-5)

Given similar exclusions from the coverage of this chapter and the chapters on cross border trade in services and investment, the Electronic Commerce chapter may not add greatly to the obligations in those chapters for media products. However, because ‘digital products’ covers a wider range of material than the free-to-air TV, pay TV and ‘interactive audio and/or video services’ included in Australia’s Annex II reservation, it ensures that audiovisual products not falling within the scope of those reservations cannot be the subject of measures that discriminate against US and other
overseas producers and suppliers. This would prevent, for example, ‘shelf-space’ quotas being imposed on local video/DVD stores.

Australia has accepted the idea of ‘digital products’ but ensured that it does not result in a greater degree of liberalisation in broadcasting and audiovisual services and investment than it has committed itself to under those parts of the agreement. For now, the main impact of the electronic commerce chapter seems to be to ensure the very open Australian market for ‘digital goods’ stays that way. Longer term, the chapter establishes the principle that anything that hasn’t been thought of should trade freely.

**Intellectual property**

AUSFTA requires Australia to adopt major elements of US copyright law, including longer copyright terms, stronger enforcement provisions and new obligations for internet service providers dealing with allegedly infringing material on their systems and networks. (Chapter 17)

These provisions will improve the ability of Australian and non-Australian copyright holders to enforce their existing rights. They will also increase the period during which the producers of copyright material will be able to control commercial use of their work. The practical implication is that Australia, as a net importer of audiovisual material with a growing trade deficit reflecting the growth of pay TV and DVD in recent years (Australian Film Commission), will have to continue to pay for some old material which would otherwise have entered the public domain and become freely available. For creators of new works which make use of archival material, such as documentary and web producers, longer copyright terms represent a formidable practical and financial obstacle.

Copyright terms must be extended by 20 years to life-of-the-author-plus-70-years (for works such as books, photographs, artworks, sheet music) and 70 years after publication (for films/TV programs and sound recordings. (Article 17.4.4) This need not be done for material in which copyright has already expired. (Article 17.4.5)

Some changes will be required to Australian law to tighten protections for ‘technological measures’ and encrypted satellite program signals, including the introduction of criminal and civil sanctions for certain activities relating to devices or systems for decoding satellite signals without permission. (Articles 17.4.7, 17.7)

The agreement sets out certain conditions under which ISP’s can qualify for immunity when dealing with allegedly infringing material carried over their networks or systems. (Article 17.11.29) The Exchange of Letters on ISP Liability provides model notices which may be served on an ISP by a copyright owner or their agent, and, in response to such a notice, by a subscriber. The Minister says this will require Australia to establish:

a fair but expeditious process that allows copyright owners to pursue through the court system alleged infringements on the Internet while preserving procedural fairness for Internet Service Providers and subscribers…the agreement does not
require Australia to implement a system where copyright owners can issue subpoenas to ISPs for subscriber details without court approval. The FTA’s provisions will also allow Australia sufficient flexibility to introduce a notice and take down system that incorporates procedural fairness. (Williams, IIA)

The agreement also includes provisions about trade marks, patents and designs (some of which may require minor changes to Australia’s existing law), domain names and cybersquatting (with which Australia already complies) and federal government agencies’ use of non-infringing software. On the last point, widely seen as an attempt by the US proprietary software industry to restrict government purchasing of open source software, DFAT’s Guide to AUSFTA says agencies are already ‘exemplars of appropriate behaviour’.

**What happens next**

AUSFTA is not yet law. At the time of writing (early-April), the text of the agreement was still ‘subject to legal review for accuracy, clarity and consistency’. Trade Minister Mark Vaile has formally referred the agreement to the Joint Standing Committee on Treaties (JSCOT) for inquiry and report. The Committee has invited submissions, planned public hearings around the country and aims to report by 23 June 2004. The US Administration notified Congress of the agreement on 13 February.

The date for signing the agreement has not yet been settled, but it is expected to be soon after the 90-day period for US Congressional notification elapses in mid-May 2004. Signature does not bind Australia to the terms of the agreement under international law. This will not happen until both governments complete their domestic approval processes, which include the Parliament and Congress passing any necessary legislation. At this stage, the agreement is unlikely to come into force before 1 January 2005. Under the President’s current ‘trade promotion authority’, Congressional approval of any necessary domestic legislative changes must be sought in an omnibus bill which can be passed or rejected, but not amended. The Australian Government is planning nine legislative amendments, which may also be presented to the Parliament in a single bill. (Deady) Unlike the US position, the Parliament, in theory, can amend or refuse to pass any aspects of the implementing legislation. If it does so, Australia can be legally bound under international law to obligations accepted by the executive arm of government, but which it cannot fulfill. (DFAT Treaty Making)

It is understood that no legislative changes are proposed to implement the new limits on the ABA’s powers implicit in Australia’s reservations about quotas. This seems surprising. When the ABA’s obligation to perform its functions consistent with Australia’s international obligations (*Broadcasting Services Act*, original version of s 160(d)) was narrowed in 1999 to a requirement for it to perform its functions consistent only with the CER Trade in Services Protocol (*Broadcasting Services Amendment Act (No. 3) 1999*), the Minister’s second reading speech explained the purpose very clearly. It was to ensure the ‘special position’ of New Zealand was retained, ‘while making it clear that there are no flow-ons…to other treaties’. (McGauran) An ABA which reached a future decision in part by having regard to AUSFTA should be treated, under administrative law, as having taken into account an
irrelevant consideration. If the government wants to constrain its regulator to exercising its powers consistent with the limits contemplated by AUSFTA, it needs to get the Parliament to do it by amending the legislation.

While Australian and US trade officials were negotiating their bilateral deal, the member states of UNESCO (United Nations Educational, Scientific and Cultural Organisation), including Australia and the US, were beginning the process of drafting a new international convention about cultural diversity, discussed elsewhere in this volume. This convention is motivated by concerns about the marginalisation of cultural issues in a regime of global governance dominated by the trade liberalisation agenda of the WTO. Australia has not been enthusiastic about this UNESCO initiative. It has preferred to safeguard any capacity for cultural policy-making flexibility through the mechanism of targeted reservations in trade agreements – broad in the case of SAFTA and ATFTA, narrow in the case of AUSFTA. The draft AUSFTA text embodies more extensive concessions about future cultural policies than the multilateral UNESCO process seems likely to settle on.

**Conclusion**

When AUSFTA was announced, much was made of the very different spins put on the outcome for audiovisual services by the two countries. An Australian Department of Foreign Affairs and Trade Fact Sheet said:

> The Government has protected our right to ensure local content on Australian media, and retains the capacity to regulate new and emerging media, including digital and interactive TV. The agreement ensures that there can be Australian voices and stories on audiovisual and broadcasting services, now and in the future.

The US Trade Representative, Robert Zoellick, had a different story:

> In broadcasting and audiovisual services, the FTA contains important and unprecedented provisions to improve market access for US films and television programs over a variety of media including cable, satellite and the Internet.  
(Zoellick AUSFTA)

The US claim was later explained to mean Australia has gone further in AUSFTA than it had gone before in the WTO, SAFTA and ATFTA. (Deady) It still hasn’t gone as far as the US would like, but it has set an important precedent, particularly for US negotiators seeking additional commitments on audiovisual services from the EU and others through the WTO.

If AUSFTA passes the domestic approval processes in both countries and enters into force, it should have no impact on Australian cultural tax concessions, international co-production agreements, indigenous programs, spectrum allocation processes and universal service policies. It should also have no substantial impact on the activities of public cultural agencies. If there are modifications to the initial draft text, it may also have no impact on grants, subsidies and investments in cultural activities and enterprises, as appears to have been the Australian negotiators’ intention.
On intellectual property and quotas, however, the impact is more substantial. For Australian producers and users of intellectual property, there are winners and losers, but, as a net importer, the losses outweigh the wins. With quotas – or, more broadly, interventions into distribution processes – Australia has preserved some capacity to maintain and adopt local content requirements, but compromised its currently unfettered capacity.

In summary, while Australia will be free to adopt many kinds of policy measures affecting audiovisual and cultural activities, the circumstances in which it can exercise some of the powers it has reserved in new media markets are likely to be very limited.

This all amounts to more concessions than many in Australia’s audiovisual and cultural industries might have hoped, but less than they feared. It does so just as a rival template for the relationship between trade and cultural policy is being developed in UNESCO. The precise impact of AUSFTA will depend on how ‘new media’ replaces, subsumes or supplements ‘old media’, and how quickly.

AUSFTA institutionalises much lower aspirations about the level of Australian content in emerging media systems than Australians have come to expect in broadcast television. Some see this simply as an articulation of the policy impotence which will inevitably flow from technological change. The Weekend Australian summarised the outcome on audiovisual as ‘Political heat turned down by retaining free TV local content rule, but bows to the reality that new technology will rule because it will empower consumers to watch what they want’. (‘The trade deal’)

Others, however, will recognise it as a partial, but historic, concession of Australian policy capacity resulting from a bilateral negotiation with the world’s global audiovisual superpower at a decisive moment in international relations – a concession Australia has not yet had to make in the multilateral WTO. They will also recognise it as a broad acceptance of the long-standing US agenda for the development of the information economy - long and tough protections for intellectual property rights, but increasingly liberal global markets in which to trade them.

References


Australian APEC Study Centre Monash University, 2001, An Australia-US Free Trade Agreement: Issues and Implications, Department of Foreign Affairs and Trade, Canberra.


Department of Foreign Affairs and Trade (DFAT), 2004 (March), Australia-United States Free Trade Agreement: Guide to the Agreement, DFAT, Canberra. [DFAT Guide to AUSFTA]

Department of Foreign Affairs and Trade (DFAT), 2004 (March), ‘The Australia-United States Free Trade Agreement: the outcome on local content requirements in the audiovisual sector’, DFAT, Canberra. [DFAT Audiovisual Outcomes]

Department of Foreign Affairs and Trade (DFAT), 2004 (February), ‘Audiovisual’, Fact Sheet on the Australia-United States Free Trade Agreement’, DFAT, Canberra. [DFAT Audiovisual Fact Sheet]


McGauran (Minister for the Arts and the Centenary of Federation), Second Reading Speech on the Broadcasting Services Amendment Bill (No. 3) 1999, *Commonwealth Parliamentary Debates*, House of Representatives, 6 December 1999, p 12892.


Vaile, The Hon Mark MP (Minister for Trade), Speech to a APEC Study Centre and AustA Conference, ‘How the deal was done’, Canberra, 1 March 2004.


Williams, The Hon Daryl AM QC MP (Minister for Communications, Information Technology and the Arts), Address to the Annual Internet Industry Association (IIA) Annual Gala Dinner, Sydney, 12 February 2004 [Williams IIA]


Zoellick, Robert (US Trade Representative), ‘US and Australia complete free trade agreement’, USTR Press Release, 8 February 2004. [Zoellick AUSFTA]


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