

**Film Victoria Free Trade Agreement Seminar
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**Opportunities and Implications for Australia's Film, Television
and New Media Sectors**

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Good afternoon, and let me first say thank you to Film Victoria for the invitation to speak to you and discuss some of the implications and opportunities arising from Australia's free trade agreement with the US. I have been asked to comment on the impacts for the cultural industries and more specifically, the audiovisual industries, of the Australia US Free Trade Agreement.

Before I get underway I would like at this point to acknowledge the tireless efforts of the organisations and individuals who consistently contributed to the debate, and diligently supported the negotiators to try and preserve Australia's local content rules and other areas affecting the audiovisual sector.

In particular, I would like to highlight the work of Simon Whipp and Lynn Gailey of the Media Entertainment and Arts Alliance (MEAA), the Australian Screen Directors' Association's (ASDA) Richard Harris and Megan Elliott of the Australian Writers Guild (AWG), and the excellent work done by the AFC's policy and research staff. I would also like to thank the Screen Producers' Association of Australia (SPAA), the Australia Council & the officials at DCITA, as well as Jock Given and Nick Herd for their contribution.

On 13 August 2004, the Federal Parliament passed legislation enabling Australia's commitment under the Australia-United States Free Trade Agreement, allowing the agreement to be implemented as early as 1 January 2005, pending the exchange of letters later this year. Negotiations on the agreement were finalised in February this year after 11 months of talks between the two countries.

The opportunity to reflect upon the FTA today is timely, not just because it is likely it will come into effect at the beginning of next year, or because of any particular requirements or undertakings within the Agreement, but rather because of what we can observe and draw from our involvement in the negotiation process, because we have just been through an election campaign and election commitments were made by both major parties to the film industry, and because of developments in the broader communications area likely to unfold in the coming period. The period of the FTA negotiations, and the participation in them of the Australian screen content creation industries, were a defining moment in the development of our industries. In my opinion it is important that we reflect upon this fact, and why, as we set off into the next period.

The AFC began working on the Free Trade Agreement as soon as the negotiations were announced, and remained closely involved throughout the process.

As a statutory authority with a specific role to advise government on audiovisual issues, the AFC has a long history of internationally recognised research, analysis and policy development.

The AFC has also had a long history advising on audiovisual issues in international trade agreements, bi-lateral and multilateral. Those of you who followed the Marrakesh round will recall that the audiovisual provisions became a significant issue for the round and that hasn't changed. The AFC worked with

the government on the WTO's Doha round (our Chair, Maureen Barron, is a member of Minister Vaile's WTO Advisory Committee) and the AFC was an active participant in the drafting of the cultural exclusion to the Australia/Singapore FTA.

As a relatively small industry in Australia some may be wondering why audiovisual became one of the key areas of contention in the US negotiations. The Australian government's negotiating objective was to:

Ensure that the negotiations take account of Australia's cultural and social policy objectives, and the need for appropriate regulation and support measures to achieve these objectives in areas such as audiovisual media.

The US government's objectives were not as clearly articulated. They sought to:

Pursue disciplines to address discriminatory and other barriers to trade in Australia's services market. ... [Also they sought] improved transparency and predictability of Australia's regulatory procedures, ... and additional disciplines for telecommunications services and other sectors as necessary.

The Motion Picture Association of America (MPAA), which represents Hollywood's largest seven studios however, was far more forthright in its objectives, and the Australian audiovisual industry and the Australian government understood that US ambitions were high in this area. This was quickly confirmed as negotiations began. Stephen Deady, Australia's Chief Negotiator, once described to me the variance in each country's ambitions as being one of the most difficult elements of the negotiations to resolve. Why was this the case and why has the concluded agreement been described by the Australian government as having:

Protected our right to ensure local content on Australian media and ensured that there can be Australian voices and stories on audiovisual and broadcasting services, now and in the future.

whilst at the same time being described by the US government as containing:

important and unprecedented provisions to improve market access for U.S. films and television programs over a variety of media including cable, satellite, and the Internet.

The concluded agreement does do both and represents compromises by both sides. Australia has maintained its ability to ensure local content on Australian television screens into the future while at the same time giving unprecedented commitments over its future ability to regulate in this area, moving considerably from its WTO position and that adopted in the Free Trade Agreement with Singapore.

In order to understand this outcome better, it is important to understand the government's current support for Australian content and its rationale.

It is significant to note that forty years of government support for Australia's audiovisual industries has not been to support the industry per se. Rather, the purpose of support measures – regulation, subsidy and some taxation measures – is to ensure that when Australian audiences go to the cinema or turn on their televisions, they have a choice to see films and programs which reflect Australian experiences and an Australian reality.

The fundamental purpose of these government interventions is cultural and it is impossible to assess the value of culture, the value of the outcomes of these interventions, based solely in economic terms. Benefits fall broadly under those that are tangible and easily quantifiable, and benefits which are intangible. Economic theory acknowledges these but cannot measure them. In the

preparation for negotiations, the AFC and the Australia Council jointly commissioned advice from both Allens Consulting and the International Centre for Economics and both consultants acknowledge the shortcomings in economic theory and practice for measuring intangible benefits and returns.

We need Australian films and Australian television programs to interpret an Australian identity to us and project this to the world with flow-on benefits to tourism and business. Australian film and television have played a central role in establishing an international profile for our country and our culture and continue to do so.

Australian governments of all persuasions have accepted that without government intervention it is extremely difficult for small nations like ours to produce cultural goods that give full expression to our stories, ideas and images.

As you know, the current measures of audiovisual support are a mix of subsidy, some tax incentives to assist private investment; and most significantly in the context of the US negotiations, regulated minimum quotas for Australian content on free-to-air and subscription TV.

Despite subsidy and quota measures, the Australian audiovisual market remains one of the most open in the world. Without regulation and subsidy, Australian audiences' access to Australian content, would be severely affected.

At this point it is worth saying that some commentators in the media and some politicians think that runaway foreign productions are the panacea for the local industry. Or at the very least they make no distinction between the production of local screen content and the servicing of foreign productions. The Australian industry welcomes foreign production because of the wider economic and employment benefits, but the presence of studios like Fox and foreign productions like *The Matrix* do very little to deliver Australian programs. Such

productions film here and go home, as do the profits. Foreign production is usually a US off-shoot and must be distinguished from the local industry.

The fact is that ongoing levels of foreign production can only be sustained where indigenous film industries have reached a high level of sophistication. Without a thriving indigenous industry, foreign productions will not come here to take advantage of Australia's skill-base, technical infrastructure and lower dollar.

So, to come back to the recent agreement with the US and its outcome. The Australian industry's view was that a 'carve-out' from treaty obligations should be agreed for specified cultural services, as had been agreed in Australia's treaty with Singapore.

As was expected, the US quickly indicated that this would be unacceptable and that significant concessions would be required to conclude the treaty. AFC representatives, including myself travelled to Washington and LA to meet US representatives, to further explore US ambitions and Australia's interests.

It was very clear from that visit that the Motion Picture Association of America saw the negotiations with Australia and the possibility of a treaty as a defining moment in their long fight against local content measures worldwide, which so far, at a WTO level, they had not won.

Australia has been on the US trade watch list since 1991 because of its local content quotas. The precedent of allowing Australia to retain the right to support its local content without restraint was totally unacceptable to the US. In the face of a lack of progress in the multi lateral area, the US's strategy had focussed on a series of bi lateral agreements. Australia was to be the first with a developed and sophisticated economy, and while the commercial outcomes for the US in the audiovisual area were insignificant, the symbolism and the precedent value were enormous.

It quickly became the case that both the US and Australian industries focussed their attention on the future – the rapid technological change to digital delivery that continues to change delivery platforms for audiovisual content, in time periods which will astonish us. Consider some of the new technologies which most of us now consider part of our daily lives such as broadband Internet, mobile phone services, DVDs which weren't available a decade ago.

The MPAA President commented openly on the significance of technological change for content delivery, saying in September 2002 that:

'The Internet, without doubt, is the greatest delivery system yet known to this planet. It has the potential to reshape how we communicate, how we buy and how to enlarge the dispatch of knowledge on a scale never before exhibited. The movie industry is eager to use the Internet to deploy our movies, thousands of titles of every genre, to homes in this country and around the world.'

Digital subscription television has just been launched in Australia and most commentators agree that within a relatively short period – say 10 years, the balance between the free-to-air broadcasters and subscription broadcasters share of the market will swing towards the latter.

Price Waterhouse Coopers New York released a report in 2002 stating that by 2010, virtually all entertainment and media will be in a digital format. Digital delivery will allow us to download movies via the Internet or our mobile phones and watch these on our choice of screen – television, laptop or home cinema.

It will certainly be technically possible to feed films digitally via satellite to cinemas in Australia direct from source – a potentially cheaper option and certainly one which could assist with on-going concerns of piracy.

For the US studios, with their vast libraries of copyright, and more being created every day, the digital domain and the new services which will emerge, are green fields territory. Their goal was to ensure that this new area remained unfettered by any local content restrictions. And the starting point was of course to argue that these kinds of technologies are impossible to regulate.

In response, to assist Australia's negotiators to assess this claim, the AFC examined future audiovisual services and the possible regulatory options to provide space for local content. Our paper entitled *Flexible Visions: A snapshot of emerging audiovisual technologies and services, and options for supporting Australian content* revealed that governments throughout the world are facing similar challenges, and are undertaking reviews of regulatory options for content on digital and interactive delivery systems.

The AFC examined 18 new forms of audiovisual content delivery: these included broadband websites, datacasting, digital film distribution and exhibition, video on demand, personal video recorders, interactive television and mobile telephony. The number and range of these platforms highlight the importance of supporting Australian content availability in digital format.

Out of these 18 new delivery technologies, seven were regulated for local content purposes in at least one country outside of Australia. A further seven technologies were being examined by regulatory authorities in Europe, North America and Asia. Only three technologies – 3rd generation (3G) phones, digital film distribution, and peer-to-peer (P2P) networks – were unregulated to support local content or had yet to be examined as to possible regulatory options.

The need to retain Australia's regulatory flexibility for future as yet unconceived audiovisual services was key to the negotiations in our area. It was equally critical to the US to exclude this. The result is a balance between these conflicting interests achieved in the face of overwhelming pressure. The

Australian government will be able to take measures to ensure Australian content on “interactive audio and/or video services” is not unreasonably denied to Australian consumers, if it is determined that Australian material is not readily available.

One important point to note is that the definition of new media as interactive audio and/or video services restricts it to media such as interactive television and mobile telephony rather than e-cinema – where movies could be beamed directly into cinemas in Australia from Hollywood studio bases. This has implications for access by Australian feature films to Australian cinemas if, for example, the US no longer sees the need for local distribution agents. At the moment there is no regulatory intervention by the Australian government into film distribution and exhibition and, by excluding e-cinema from the new media definition, there will be no opportunity to do so in the future even if the number of Australian films being released in cinemas reaches an unacceptably low level.

However, the definition of interactive audio and/or video will cover the majority of possible new services that we identified.

In the meantime, current measures on free-to-air television have been ‘grandfathered,’ – that is, existing local content regulations will remain as they are and will not be able to be increased. There is some provision, within limits, to extend current measures if multi-channeling is introduced. As you know, the government is currently considering the introduction of multi-channeling and /or the introduction of a fourth commercial network.

On subscription television, the current form of support (expenditure quotas) has also been grandfathered with the ability to extend current drama expenditure requirements from 10 to 20 per cent and to introduce up to a 10 per cent expenditure requirement for documentary, children’s, educational and arts programs.

This is the area of most significant compromise. The current requirement for drama channels to spend 10 per cent of their expenditure on Australian drama has resulted in approximately five per cent of the drama available on pay TV being Australian. The AFC does not believe this provides an adequate choice for consumers and will be continuing to monitor performance with the introduction of digital delivery, and of course advising government of the outcomes. The AFC is also an industry partner with Murdoch University in an Australian Research Council funded project to assess the performance of pay TV in Australia in delivering Australian content.

When the AFC began working on the issue of the proposed free trade agreement with the US, we set ourselves the goal of making the audiovisual industries one of the top ten agenda items in the negotiations. We succeeded – we came in at number two after the Pharmaceutical Benefits Scheme. We didn't get everything we wanted. It wasn't our preferred outcome. But then one rarely does in negotiations, particularly if the other side are the US studios.

We need to be able now as an industry to accept the reality of where we are, and move forward to meet the new policy challenges that will arise. We need to make it clear to the government that we are ready and able to work with them confronting and dealing with the new delivery systems for content, to help the Australian industries to flourish in the changing environment and ensuring there is the choice for the Australian public to enjoy Australian content on whichever platform they choose at the moment.

It's still early days. However, it is clear that the government has maintained strong support for local content, but that the measures by which it may support that content have been curtailed. This will mean a greater reliance in the future on subsidy and tax-based measures to deliver similar levels of Australian content on future services, because access to minimum levels of Australian content by Australian audiences is a fundamental tenet of our system.

Whatever policy settings the government ultimately determines must deliver to Australian audiences adequate levels of choice, quantity and diversity of Australian content. At minimum, these levels must be at least equivalent and in proportion to those which audiences currently enjoy. One of the difficult factors is going to be the range and diversity of options for delivering content, from mobile phones to PVRs (personal video recorders). We as an industry really need to think ahead and help and encourage the government to tackle some of the bigger policy questions now and not later.

Regulation in support of Australian content should continue to be used to the extent it is still permitted under the Free Trade Agreement, especially with respect to subscription television. However, regulation alone will not be sufficient to ensure significant levels of local programming, especially of the more expensive genres. We will need to look at the possibilities of indirect funding, incentives for private investment, and new ways to target regulation specifically.

A substantial on-going commitment will be required by government in order to fund local content in a future converged television environment. The AFC recommends, for example, the creation of an Australian content production fund, drawn from a combination of taxes, levies and subsidy to support Australian content on new and existing services.

The shift to a digital multi-channel, interactive universe is changing the old rules in broadcasting and current business models will disappear. The future is in new media and Australia – with its wealth of creative talent and long history of film and TV production – has a GOLDEN opportunity to be a world leader in content for this new universe. The challenge for government will be to create an environment that will allow Australian content to flourish so that Australian stories and Australian voices will continue to be heard by Australian audiences

well into the future. A range of measures will be needed to work across a range of content delivery platforms.

In its submission to the current government review of broadcasting issues, which includes multichannelling and a possible fourth licence, the AFC is strongly of the view that Australian content must have a significant presence from the very beginning of all new services (including multichannels). This will involve extending the Australian content regulations to multichannelled services up to the maximum level permissible under the terms of the Free Trade Agreement. Moreover, the regulation of Australian content is now subject to the ratchet provisions of the Agreement meaning that whatever level is set at the beginning would be the maximum allowable. Very careful consideration needs to be given to the mechanisms put in place to support Australian content because of this provision. This is a prime example of how the AFC and the industry needs to work closely with government to address the policy challenges arising out of the changing technological environment.

There is a key role here to be played by a strong, independent regulatory authority. The ABA now, and more so in its new incarnation as the Australian Communications and Media Authority, needs to be resourced to enable it to fulfil this role in monitoring, researching and reporting to government on the changing environment, helping the government to draw together the many threads of this disparate area into a unified tapestry of cultural policy.

I said earlier that the period of the FTA negotiations were a defining moment in the development of our industries. This is undoubtedly the case in part because for the first time, the Australian Parliament with bi-partisan agreement, has limited its ability to regulate for local content. However, of equal importance was the fact that our industry, its output and its role in defining and nourishing Australia's culture and identity, were for a brief moment, high up on the nation's political agenda. The biggest challenge we have, as we go into the future, is to maintain or perhaps regain that position.

Culture – in any form – has slipped off the mainstream political agenda in Australia. It is interesting to note that in the election campaign just past, neither major party gave prominence or significance to their cultural policies. Nor did the media in its coverage. The broadcasting policy debate continues to be dominated by issues relating to technology, spectrum allocation, ownership and control. While there is a recognition of market failure in relation to Australian content, this is not a central concern in the development of policy around new services or the architecture of our broadcasting system. The election commitments from both major parties in relation to industry funding were welcomed by the industry, but they did not necessarily address the need for long term or fundamental change.

I am very aware that it is easy to criticise political parties for what we see as a failure to prioritise the issue of culture and Australian content. However, we also need to acknowledge the role that our industry should play to develop a coherent policy framework, to articulate the fundamental principles, to argue it in a convincing and unified manner to government. In my view, unless we rise to this challenge during this political cycle, unless culture and the fundamental importance of the ubiquitous presence at modest levels of Australian content on our screens is considered to be an issue of national importance, then the future for our industries is bleak in a world of continuing growth of delivery systems and services that inevitably fragment both the audiences for content and the revenue base for operators.

The Australian audio-visual industry worked closely with the government to conclude the Australia US Free Trade Agreement in the national interest. We will continue to advise government in future trade negotiations and a range of other policy matters which impact on content provision in broadcasting, telecommunications and new media. We need to ensure that the industry and the government maintain a firm grasp of the big picture, and a continuing

dialogue and engagement with government on the new policy challenges that confront us.

In this new environment, an environment of expanding services but restricted ability to regulate for content-related outcomes, the government must look to new transparent means to assist in the provision of Australian content to Australian audiences. With the ongoing support of government we can continue to reflect the lives of Australians to ourselves and to project an image of Australia to the rest of the world, assisting business and cultural relationships in the process.