Chapter 6

Local Media Content

The Agreement - Annex I & II (Non-conforming measures)

6.1 Under the AUSFTA, there are a series of Schedules contained within the Annexes that deal with non-conforming measures. Annex I-14 & I-15 and Annex II-6 to 8 & II- 9 relate to the following sectors: broadcasting, broadcasting and audiovisual services and advertising services. The obligations relevant for these sectors are national treatment, most-favoured nation treatment (although Annex II-6 to 8 also includes market access, while II-9 obligation is only most-favoured nation treatment) and performance rights. The measures relevant to those sectors are: *Broadcasting Services Act 1992* and *Radiocommunications Act 1992*.

6.2 The relationship between 'obligations' and ' measures' as they apply to the above-mentioned sectors are important because Annex I sets out, in accordance with Articles 11.13[1] and 10.6[2], a Party's existing measures that are not subject to some or all of the obligations imposed by the following Articles:

- 10.2 or 11.3 (National Treatment);
- 10.3 or 11.4 (Most-Favoured-Nation Treatment);
- 10.4 (Market Access);
- 10.5 (Local Presence);
- 11.9 (Performance Requirements); or
- 11.10 (Senior Management and Boards of Directors).

6.3 Annex II sets out, in accordance with Articles 10.6 and 11.13, the specific sectors, sub-sectors or activities for which that Party may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by the following Articles: 10.2 or 11.3; 10.3 or 11.4; 10.4; 10.5; 11.9; or 11.10. (Note that these Articles are the same Articles listed above for Annex I.)

6.4 Under Annex I and Annex II, a Party reserves the right to maintain existing non-conforming measures[3] that are specifically identified in its Schedule. One difference between these two annexes is that Annex I cannot make the measures more

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1 AUSFTA Chapter 11 Investment, Article 11.3 - Investment Non-Conforming Measures

2 AUSFTA Chapter 10 Cross-boarder Trade in Services, Article 10.6 – Services Non-Conforming Measures

3 Non-conforming measures are those that are identified in the relevant schedule that do not conform with the obligations on national treatment, most-favoured nation treatment, performance rights, market access, local presence and senior management and boards of directors.

restrictive whereas Annex II can; and it can adopt new non-conforming measures as long as the measures have been identified in the relevant schedule.

6.5 The DFAT background paper detailing the outcomes as they apply to AUSFTA's local content provisions for audiovisual explains the Annexes as follows:

> Under the AUSFTA, Annex I can be used to reserve the right to maintain existing non-conforming measures that are specifically identified in that Annex. Annex II can be used to identify certain sectors, sub-sectors or activities where a Party reserves the right to maintain existing non-conforming measures, to make these measures more restrictive, or to introduce new non-conforming measures.[4]

6.6 Importantly, measures under Annex I are subject to a 'ratchet mechanism', which means if a Party liberalises a measure, making it less inconsistent with the obligations of the relevant Chapter, it cannot then became more restrictive. (i.e. the liberalised measure becomes bound as part of the AUSFTA commitments). For example, if the existing level of the mandated Australian television local content transmission quota were to be reduced, say, from 55% down to 40%, it cannot be returned to the former level (55%) in the future.

6.7 In Australia, programming content is regulated by compulsory standards determined by the Australian Broadcasting Authority. Pay TV drama channels are also regulated by a compulsory standard requiring expenditure on minimum amounts of Australian drama programs. Furthermore, an additional licence condition on some regional commercial television licensees specifies that licensees broadcast minimum amounts of local content within their local broadcast areas[5].

6.8 The Australian Film Commission is the Australian government agency responsible for supporting the development of film, television and interactive media projects and their creators. It focuses its efforts on the independent production sector, namely companies and individuals who are not affiliated with broadcasters or major distribution and exhibition companies[6].

6.9 The Film Finance Corporation Australia is the Government's primary agency for funding screen production. It invests in a diverse range of feature films, adult television drama, children's television drama and documentary. It aims to strengthen cultural identity by providing opportunities for Australians to make and view their own screen stories. It invests only in projects with high levels of creative and technical contribution by Australians[7].

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4 http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html

5 http://www.aba.gov.au/tv/content/index.htm, accessed 8 June 2004

6 Australian Film Commission, Annual Report 2002-2003, http://www.afc.gov.au/archive/annrep/ar02_03/ar001.html, accessed 10 June 2004

7 http://www.ffc.gov.au/about/ accessed 10 June 2004

6.10 As stated in the Committee's interim report the key issue for media and broadcasting is whether the AUSFTA allows sufficient flexibility for the Australian government to pursue cultural objectives through local content regulations now and in the future.

6.11 Representatives of Australia's film industry were passionate about the likely long-term effects of the Agreement on the industry and the audiovisual market, in Australia:

> What is in this agreement for the United States of America? One might ask how much bigger a share of the Australian audiovisual market US companies want, or is this free trade agreement with Australia more about setting a precedent for negotiating with the European Union? From the start of this process of negotiation with the United States, our organisations have sought to work in good faith with the government to ensure that the outcome of a free trade agreement with the US is of overall benefit to the nation but does not result in adverse effects on the audiovisual sector, a position which we understood was shared by the government. We have now had the opportunity to study the text of the agreement and we have found that there is no economic benefit to the audiovisual sector from this agreement. Australia will not gain any greater access to the US audiovisual market. The US has no tariff or non-tariff barriers that could be removed by this agreement, yet it will remain one of the most closed markets for audiovisual product in the world. The size of its domestic market and the inward-looking nature of its cultural production make it both entirely self-sufficient and the world's largest net exporter of audiovisual products and services.
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> The agreement will severely constrain the ability of this and future Australian governments to determine cultural policy, giving to the government of the United States a much stronger role in the determination of that policy. We will be moving from a position of being solely in charge of our own cultural policy to one where we must consult with the largest cultural producer in the world, and our dominant trade partner, on how we determine our future.
>
> The constraints on government policy mean that in the longer term, over the next 10 to 15 years, the audiovisual sector will be worse off than it is today. This agreement is not a blueprint for growth. It is not a vision for an expanding audiovisual sector encouraged by sensible and astute policy intervention. Instead, it represents a declaration by Australia of its declining aspirations for what it can achieve in the promotion of its culture. This is the most disappointing aspect of the agreement. Much has been made by the government of its success in retaining current Australian content standards for commercial television, despite the fact that they cannot be increased and will likely be rolled back in future years. However, as one reads the text it is clear that much lower targets have been set for newer and still-to-be-developed media.[8]

8 *Transcript of* Evidence, 4 May 2004, p.2 (Elliott, AWG)

6.12 The Minister for Trade, however, presented a very different view of the provisions of the Agreement in this area:

> We knew that the US would push us very strongly in relation to the audio-visual sector, as this is an industry of great economic importance and political clout in the US.
> The Australian Government, however, made it clear from the outset of negotiations that any outcome in this area must protect Australian culture.
> The end result on audiovisual was, in fact, excellent. It:
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> - preserves all existing local content requirements on free-to-air and Pay TV;
> - allows the Government flexibility to significantly increase local content on free-to-air TV if it moves to digital multichannelling;
> - allows the Government to increase the existing 10% expenditure quota on drama channels on Pay TV up to 20% if necessary, and to introduce similar expenditure quotas of up to 10% on four additional program formats (the arts, children's programming, documentaries, and educational programming);
> - allows the Government to intervene in the future on interactive media platforms to ensure Australian content is readily available on those platforms.
>
> The bottom line is these commitments give Australia sufficient flexibility to not only maintain the current amounts of local content available to Australian audiences as new media services become more important, but to actually increase these amounts.[9]

Adequacy of Levels of Local Content

6.13 The government has stated consistently, during this inquiry and in published DFAT advice, that the outcome of the negotiations on audiovisual and broadcasting services preserves Australia's existing local content requirements and other measures and ensures 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.

6.14 Although the Australian industry seems satisfied with the requirements for local content on free-to-air television, industry witnesses were concerned that the Agreement does not allow for any increase in quotas. They are also concerned that these levels are likely to be rolled back in the future.[10]

6.15 Any diminution of local content would presumably result from the 'ratchetting' provision applying to cross-border trade in services that is contained in *Article 10.6.1(c)* of the Agreement. As explained earlier in this chapter, that provision would prevent an Australian government, if it reduced the transmission quota for free-

9 Minister for Trade, Hon. Mark Vaile MP, Speech to the Business Breakfast Roundtable on USAFTA, 20 February 2004, p.5

10 *Transcript of Evidence*, 4 May 2004, p.2, (Elliott, MEAA)

to-air television from its current level of 55 percent, from later increasing the quota back up again from the new, lower level.

6.16 Several submissions and witnesses argued that the agreed quotas for new or still-to-be-developed media are too low. Each of these areas is discussed below. The general tenor of the criticism was conveyed to the Committee by the Media Entertainment and Arts Alliance (MEAA):

> In subscription television the market share target will be frozen at 10 percent, or possibly 20 percent, for Australian drama. In new media no targets at all have been set, but the strong implication of the agreement language is that they will be small and will have to meet rigorous tests over which the United States will have a large say.[11]

Sub-quotas

6.17 In its interim report the Committee stated that it had heard conflicting views about the government's ability to change existing sub-quotas or institute new sub-quota requirements for specific program types within the 55 percent content requirement.

6.18 MEAA considers that the wording of *Article 10.6.1(c)* 'would not allow for the introduction of additional sub-quotas nor for an increase in transmission hours for existing sub-quotas'. It suggested that if the Annex I-14 reservations were made Annex II reservations, this would remove the impact of the 'ratchetting' provisions on the sub-quotas.[12]

6.19 The AUSFTA Backgrounder published by the DFAT states that, 'Subquotas may also be applied within the 55% programming quota'. The Committee notes that it is silent on how those subquotas may be applied, and therefore silent on whether they may be increased.

6.20 In evidence that tended to dispel concerns of the kind raised here by the MEAA, the Australian Broadcasting Authority (ABA) informed the Committee that it had been advised that sub-quotas are not caught within the 'ratchetting' rule and that they can be altered and possibly increased provided that overall the 55 percent cap is adhered to.[13]

6.21 In the Committee's view, the matter will probably only be clarified in the event that a dispute arises in this area. The government's view, however, is very clear, and DFAT has published the following statement in relation to the final outcome on audiovisual:

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11 *Transcript of Evidence*, 4 May 2004, pp.2-3, (Elliott, MEAA)

12 *Supplementary Submission 85*, pp.8-9, (MEAA)

13 *Submission 130*, pp.8-9, (ABA)

> Ensures that Australia maintains sufficient freedom to introduce new or additional local content requirements in relation to:
>
> - Possible digital multichannelling on free-to-air commercial TV.
> - Subscription TV.
> - Interactive audio and/or video services.
>
> This outcome was a carefully negotiated one. Its key aspect was 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.[14]

Lower Quotas

6.22 As indicated earlier, the industry has expressed concerns that the standstill agreement on local content, allied with the 'ratchetting' provision, will result in lower local content requirements. The industry argues that while the quotas are now at their highest levels, they have been significantly lower in the past when the networks were not making profits. If the networks were again to become unprofitable, there would be pressure to lower their costs. Because local productions are expensive compared with the imported product, there would be an incentive to request lower quotas for local content.

6.23 Moreover, the industry argues that as subscription television gains market share, the discrepancy between the 10 percent expenditure quota for subscription television (possibly 20 percent for drama) and the 55 percent transmission quota also will lead the networks to pressure the regulator to lower the free-to-air quota.

6.24 The difficulty for the industry is that, once lowered, the 'ratchetting' provision will prevent any later increase in local content quotas. In the words of Create Australia:

> In our accepting this constraint upon our freedom to act the USA has gained from Australia not just agreement to 'stand still', but also to be the basis upon which Australia can be pressured into moving towards progressive liberalisation.[15]

Subscription Television

6.25 Under Annex II Australia is allowed to impose a local content requirement of 10 percent of a provider's expenditure on the arts, children's, documentary, drama and educational services. Provision is made for an increase in the drama quota to 20 percent of expenditure if the Australian government finds 'that the expenditure requirement for the production of drama is insufficient to meet its stated goal for such expenditure'. The Annex further states that, 'Such a finding shall be made through a transparent process that includes consultations with any affected parties including the United States. Any increase imposed shall be non-discriminatory and no more burdensome than necessary'.

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14 http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html

15 *Submission 459* , p.13, (Create Australia)

6.26 The industry's concerns with these provisions, as expressed by MEAA, are that the quotas are too low, essentially token,[16] and that consultation with the United States is 'completely inappropriate'.[17]

6.27 It is suggested that the expenditure quota of 10 percent, especially as it applies to drama, would result in only about three and a half percent of actual programming. Even an increase to 20 percent would translate only into about a 7 percent transmission quota.[18] These figures compare unfavourably with the requirements for local content on free-to-air services. MEAA stated that the quotas also compare unfavourably with those imposed in overseas countries. Canada, for example, is said to have a 60 percent content quota on some channels.[19]

6.28 DFAT argues, however, that (a) expenditure quotas relate to new programming, which translates into new money for the industry, and that (b) programming quotas would allow channels to schedule reruns to meet the quotas. The department informed the Joint Committee on Treaties that:

> That is why we think what we have here is a very good outcome.[20]

6.29 It can be argued that, because there will be many subscription channels, a 10 percent expenditure quota imposed on a large number of them would add up to a significant amount of money[21] for programming and production, and hence result in more work for the local industries. MEAA asserted, however, that because each subscription channel spends relatively little on programming, the local industry would have the capacity to meet not only the agreed quotas, but also higher quotas. MEAA stated that:

> Essentially we believe that the argument that says we cannot make it [product] because there would be too many channels is simply not true. [22]

6.30 As stated above, the industry is also concerned that the agreement provides that the drama quota may be increased only after consultation with the United States. MEAA informed the Committee that the United States would oppose any increase in quota above 10 percent, and submitted a statement made by the Motion Picture Association of America to support this assertion.[23] MEAA recommended that the words 'that includes consultations with any affected parties including the United

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16 *Transcript of Evidence*, 4 May 2004, p.17, (Harris, MEAA)

17 *Supplementary Submission 85*, p.9, (MEAA)

18 *Transcript of Evidence*, p.17, (Elliott, Brown, MEAA)

19 *Transcript of Evidence*, p.19, (Herd, MEAA)

20 Joint Standing Committee on Treaties, *Report 61, The Australia-United States Free Trade Agreement*, p.181

21 Joint Standing Committee on Treaties, *Report 61 The Australia-United States Free Trade Agreement*, p.178

22 *Transcript of Evidence*, 4 May 2004, p.20, (Harris, MEAA)

23 *Supplementary submission 85*, p.9, (MEAA)

States' and the sentence, 'Any increase imposed shall be non-discriminatory and no more burdensome than necessary' should be deleted from the Agreement.[24]

6.31 The Select Committee notes, however, that it is standard practice in trade agreements to consult with affected parties where changes are sought, and also to proceed on the basis of measures being 'non-discriminatory and no more burdensome than usual'.

Multichannelling

6.32 While a reservation has been negotiated for local content for multi-channelled free-to-air commercial broadcasting services, the future of this technology is uncertain and it is not clear whether the reservation will have any beneficial effects for the Australian industry. One witness informed the Committee that:

> We cannot see any example around the world of a successful free-to-air multichannelling operation. The BBC's Freeview operation is supported by very significant funding with the licence fee that the BBC has. In Australia we saw that the ABC's attempt at multichannelling had to be shut down because they could not afford it.[25]

6.33 According to MEAA the most likely use of multichannelling will be the provision of subscription channels[26] and the low quotas relating to that medium would apply, rather than the more generous quotas that relate to free-to-air services.

6.34 The industry has two other concerns about the agreement on free-to-air multichannelling. First, the industry claimed that it had not been consulted actively and that the Agreement in that regard had been unexpected.[27] Second, it is not clear what the effects of the agreed quotas will be, given uncertainties about how the media might develop.

6.35 MEAA stated that if the technology were to develop so that 24 free-to-air channels became available, the Agreement would require that only three of those channels should carry any Australian content. One witness stated that, 'If that were to emerge, we would be really concerned'.[28] The Committee notes, however, that the Agreement in fact specifies the 55% transmission quota for no more than 2 channels (or 20%) – whichever is the greater) *for any individual broadcaster*. This seems to imply that if there were 3 multichannelled broadcasters, each with 8 channels, then two channels per broadcaster - that is, six channels – would be subject to 55% local content rules

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24 *Supplementary submission 85*, p.9, (MEAA)

25 *Transcript of Evidence*, 4 May 2004, p.22, (Herd, MEAA)

26 *Transcript of Evidence*, 4 May 2004, pp.21-22, (Harris, MEAA)

27 *Transcript of Evidence*, 4 May 2004, p.21, (Brown, MEAA)

28 *Transcript of Evidence*, 4 May 2004, p.21, (Brown, MEAA)

6.36 MEAA is also concerned about sub-quotas for multichannelled television. It has suggested, consistent with its concerns about quotas for other free-to-air television broadcasting, that the words 'in a manner consistent with existing standards' in the reservation would prevent the introduction of new sub-quotas or changes to existing sub-quotas. It has proposed that the words be deleted from Annex II-6(a).

Advertising

6.37 AUSFTA provides, in Annex I-14, that transmission quotas for local content imposed on advertising that is broadcast by free-to-air commercial television broadcasting services shall not exceed 80 percent of advertising time transmitted annually between 6.00 am and midnight. Because the reservation is contained in Annex I, the 'ratchetting' provision applies if the quota requirement is lowered.

6.38 There is no agreed quota for advertising on any other current or future broadcasting medium. The ABA submitted that networks seldom exceed half of the 20 percent of imported product permitted under the Australian Content in Advertising Standard which came into effect in 1992. This suggests that local advertising enjoys a level of natural advantage against imported product.

Interactive audio and/or video services

6.39 MEAA is concerned that the term 'interactive audio and/or video services' may be too restrictive to enable future governments to regulate for Australian content on all future technologies. MEAA stated that it:

> … notes that the use of 'interactive audio and/or interactive video services' remains unchanged from the draft text to the final text. It is of real concern that if, as previously advised, this terminology was intended to cover new media –currently known and yet to be devised – that it was not possible for certainty to be achieved by the inclusion of a definition.[29]

6.40 MEAA has proposed that the words of the reservation in *Annex II-7(f)* be changed to 'interactive audio and audiovisual services and all other audio and audiovisual services not yet regulated now known and yet to be devised'.[30]

6.41 DFAT informed the Committee that the wording of the reservation had resulted from close dialogue with the industry during the negotiations and that the wording had been used deliberately to leave open what type of mechanism would be used if governments were to choose to use them.[31] DFAT also stated that if an

29 *Second supplementary submission 85*, p.5, (MEAA)

30 *Supplementary submission 85*, p.9, (MEAA)

31 *Transcript of Evidence*, 6 July 2004, p.121, (Churche, DFAT)

audiovisual service is not interactive, if it is broadcast or if it is pay television, it is covered by other reservations under the agreement.[32]

6.42 The evidence is that both the industry and the negotiators were intent on ensuring that Australian governments would continue to be able to regulate for Australian programming content, whatever media might be developed. The issue is whether the wording of the reservation in *Annex II-7(f)* will achieve that end. The latest advice from DFAT on these matters was presented at the least hearing of the inquiry.

> The local content arrangements we have at the moment are all based on forms of media where the viewer really has no control over what is broadcast. The whole point with free-to-air TV as we have historically known it, or with radio, is that someone else has the role of programming it and the audience has very little role in controlling it. So we have particular types of mechanisms. The whole point of that particular category [interactive audio and/or interactive video] was to recognise that, yes, the whole environment is changing. We do not even know what type of local content requirements we would use on interactive media. The whole point of the way in which that part of our reservation is worded is that we have deliberately left open what type of mechanisms we would use if governments were to choose to use them.[33]

Public Broadcasting

6.43 The government has consistently reiterated its assurances that nothing in the Agreement will affect in any way the government's right to support the cultural sector through the allocation of public funding. Nor will it affect public broadcasting via the ABC or SBS, including the amount of Australian programming on their channels.

6.44 The Australian Broadcasting Corporation (ABC) submitted that while the Agreement apparently is intended to exclude public broadcasters, the text may not have that effect.[34] The ABC has drawn attention to the definition of 'a service supplied in the exercise of governmental authority' which is, 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'.

6.45 The Corporation informed the Committee that while it does not compete with the commercial broadcasters for advertising contracts, it is in competition with them for both audiences and programs, and that a High Court judgement had found that its position is not materially different from a commercial broadcaster with whom it competes.[35]

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32 Foreign Affairs Defence and Trade, Budget Estimates, *Transcript of Evidence,* 3 June 2004, p.69, (Deady, DFAT)

33 *Transcript of Evidence,* 6 July 2004, p.121, (Churche, DFAT)

34 *Submission 130*, p.2, (Australian Broadcasting Corporation)

35 *Submission 130* , p.2, (Australian Broadcasting Corporation)

6.46 The ABC suggests that the matter could be resolved if the definition of 'services supplied …' were amended to clarify beyond doubt that public service broadcasters are exempt from the operations of Chapter 10. If the ABC's operations could be caught under the operations of Chapter 10, then so would those of the SBS which carries advertisements. MEAA has also noted that the ABC operates retail outlets, music and book publishing arms, merchandising and video and DVD sales. MEAA suggests that an additional clause should be added to Annex II-6 to specifically exempt national and community broadcasters.[36]

6.47 DFAT has stated that because nothing in the Agreement affects the ability of either Party to provide public services, and subsidies and grants are explicitly excluded from the scope of the Chapter, reservations are not required in Australia's schedules in relation to publicly provided cultural activities, such as the public broadcasters (ABC and SBS), public libraries or archives, or in relation to Government funding available to Australian artists, writers and performers.

32 *Supplementary Submission 85*, p.10, (MEAA)