



BACKGROUND

In 2004, Australian and the USA signed a Free Trade Agreement. It included some rules around local content for commercial free-to-air, cable (Foxtel) and future interactive video services (ie, streaming). Local content rules have served Australian audiences and our own industry very well for around 60 years. Just as happened in 2004, when the USA did not want Australia to enshrine existing local content laws, Australia is now facing a tough challenge in enforcing the agreed AUSFTA rules and responding to acute pressure from powerful US-based streaming businesses. It is important that Australia does not allow a “Big Tech” takeover of our local industry. We already subsidise international production costs that film on location in Australia by up to 45%. The many benefits of a robust screen industry should flow both ways, not in one direction. Australian audiences deserve better access to Australian screen culture. The promise made in our National Cultural Policy *Revive* is important and should be kept.

IS THE AUSFTA AN OBSTACLE TO REGULATION BY AUSTRALIAN PARLIAMENT?

MYTH	FACT
The AUSFTA means that Australia cannot regulate to ensure streaming services have some minimum levels of Australian content.	Under Annex II to the AUSFTA, the Australian Government enshrined the right, subject some minor qualifications, for the future ability to regulate interactive video content or genres. Streaming services did not exist in 2004 but the clear intention of the Australian Government was to have the ability to apply local content rules to new services, as technology developed.
The AUSFTA means that the Australian Parliament cannot put robust regulation on streaming platforms.	Labor’s support for the AUSFTA in 2004 was conditional on the reservation applied to local content laws. Labor’s Shadow Minister for Trade, said the following in the Senate: <i>“Labor senators on the committee recommended that Australia’s local content standards be legislated. That was the basis for the Labor Party’s decision to make our support for the FTA conditional upon this amendment to the broadcasting act.”</i>
The Howard Government put weak local content rules in place in the AUSFTA in 2004.	The then Labor Opposition insisted on amendments to the US Free Trade Implementation Act 2004, that protected local content laws, including for commercial free-to-air television, subscription (Foxtel) and importantly, reserved the future right for the Australian Parliament to regulate interactive video services or genres (streaming). The then Trade Minister said the following: “Our right to ensure local content in Australian broadcasting and audiovisual services, including in new media formats, is retained.”
The USA is worried about protecting jobs in the US film and entertainment industries, particularly in a US Presidential election year.	If the USA was concerned about protecting US jobs, streamers would have opposed the increase to 30% of the Location Offset which provides taxpayer support for international screen projects filming on location in Australia. They didn’t. In fact, through ANZSA, the representative of the Motion Picture Association of America, they lobbied very strongly in favour of this increase. Their concern is not about US jobs, but about opposing regulation in order to push back against global attempts to similarly regulate them.

SCREEN PRODUCERS AUSTRALIA

STREAMING REGULATION FACTS & MYTHS



MYTH

Australia is limited in how it can regulate streaming platforms because of the AUSFTA.

FACT

In Annex 11 to the AUSFTA, outlines some minor qualifications to Australia's right to regulate but these do not present any obstacle. This is what Annex II actually says:

(e) Measures to ensure that, upon a finding by the Government of Australia that Australian audiovisual content or genres thereof is not readily available to Australian consumers, access to such programming on interactive audio and/or video services is not unreasonably denied to Australian consumers. Any measures addressing such a situation will be implemented through a transparent process permitting participation by any affected parties, be based on objective criteria, be the minimum necessary, be no more trade restrictive than necessary, not be unreasonably burdensome, and be applied only to a service provided by an enterprise that carries on business activities in Australia in relation to the supply of that service.

MYTH

The US Government has a veto over Australian Government streaming regulation.

FACT

A current DFAT Fact Sheet on the AUSFTA says that: "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." If this is not the case, then the Australian Parliament and public are being misled about the effect of the AUSFTA.

MYTH

The AUSFTA compels the Australian Government to apply an Expenditure-based model, similar to the New Eligible Drama Expenditure (NEDE) framework applying to subscription (ie, Foxtel) services.

FACT

The NEDE scheme is dealt with in a separate paragraph to online video services and regulation for these different platforms should be considered on their own merits and limitations. Local content rules for commercial free-to-air and subscription television are specific to those platforms. Interactive video services are different and should be dealt with differently. There is nothing in the AUSFTA that requires the model for regulation of one platform (subscription television) to be applied to another (interactive video).

MYTH

If Australia insisted on fair and reasonable local content rules for streaming services, the USA would retaliate through the WTO or other ways.

FACT

It is highly unlikely that any action in the WTO against Australian local content laws would succeed because of the clear and specific reservations set out in Annex II of the AUSFTA. This would also be a very controversial step.

MYTH

An **Expenditure-based** model will ensure investment in Australian content grows over time.

FACT

Unless the Australian Government includes some sort of minimum baseline in the flawed Expenditure model, [such as a minimum 5% of Revenue baseline requirement], there is no guarantee that streaming services will increase their Australian content. Any expenditure model without some sort of baseline expectation allows investment to decline over time.

MYTH

An Expenditure Model of Regulation is viable and offers a reasonable alternative to a Revenue-based model.

FACT

No other regulating nation has adopted anything other than a Revenue-based approach to applying local content rules to streaming platforms. Recently, the Canadian regulator, the CRTC, with the authority of their *Online Streaming Act 2023* which is similarly aiming to regulate streaming services, considered this matter in some detail and took evidence from all stakeholders. The CRTC decided on a Revenue-based model, for the following reasons:

“31. The Commission considers that none of the interveners in this proceeding provided compelling evidence that using other criteria would be a significant improvement to a revenue-based threshold. In fact, using any other criteria would make base contribution requirements much more complex. 32. Accordingly, the Commission will use revenues to determine which online undertakings will make base contributions.

MYTH

The Australian regulator, the ACMA, will be able to determine a streamers “total drama expenditure for Australia” as part of an Expenditure Model.

FACT

It will be next to impossible for a third party such as the ACMA to accurately assess a global streaming business’ expenditure figures given layers of commercial sensitivity, the involvement of third parties, and determine how global licence fees or internal in-house expenditure should be attributed to the Australian market. Any model needs a fair, transparent and arm’s length way to attribute international programming expenditure to Australia. Australia’s experience in regulating other Big Tech platforms such as Meta through the **News Media Bargaining Code** shows the likely problems. Allowing streaming platforms to dictate the rules they want to the Australian Government is a recipe for future failure and more uncertainty for Australian audiences.

MYTH

Australian audiences have access to plenty of Australian content right now, so there is no need to regulate.

FACT

Some streaming platforms do invest in Australian content, for sound commercial reasons, but others don’t. For example, some services are reported as having just around 3.3% of their catalogue devoted to Australian content. Some important genres such as children’s and documentary are missing. Australian audiences have said they want to see more Australian stories on their screens. Australia provides generous screen incentives to streamers as well as paying a subscription to these businesses. We deserve something decent in return.

MYTH

An Expenditure Model doesn’t need any reference to Revenue to be effective.

FACT

Any model without some baseline based on revenue will allow declining investment over time. The previous Morrison Government proposed a reporting scheme based on a 5% of revenue baseline to avoid designation and regulatory action by the Minister. Providing a baseline minimum would be an important safeguard and send a strong signal of expectations to streamers.

WHAT ARE THE QUALIFICATIONS TO ANNEX II OF THE AUSFTA?

Annex II to the AUSFTA allows Australia to regulate audiovisual services, subject to some minor qualifications, which we believe present no obstacle to the Australian Parliament:

The Australian Government finds that Australian audiovisual content or genres is not readily available to Australian consumers	The Australian Government's 2022 Discussion Paper on streaming considered this issue and found that some services had no Australian content, while others devote only a small proportion of their catalogues to Australian content. For example, Netflix, Australia's most popular SVOD service then had an estimated 3.3% of its catalogue devoted to Australian content. When compared to a 55% minimum local content quota for broadcast services accepted under the FTA, local content on streaming services in most cases is well under 5% and ranging down to zero (0%) so this satisfies this FTA requirement. In addition, there is almost no Australian children's content on streaming services.
Be implemented through a transparent process permitting participation by affected parties	Under the current Government, there have been two formal rounds of consultation with industry, including streamers (April & November 2023) as well as numerous stakeholder meetings. Prior to that, the previous Government conducted extensive industry consultation around regulation and both the Senate and House of Reps Committees held inquiries.
Be based on objective criteria	This is a straightforward proposition that is set out in our National Cultural Policy <i>Revive</i> , that Australian stories are seen and heard, regardless of platform.
Be the minimum necessary	In other regulating countries, this depends on a number of factors such as language barriers and ranges from minimal up to 25% in EU. Canada, a comparable English language nation, is currently working towards 25%.
Be no more trade restrictive than necessary	Australia reserved the right to ensure our audiences had access to local content when it signed the AUSFTA in 2004. In the eyes of the USA with its huge film and entertainment sector, any regulation will be viewed as trade restrictive. Local content regulation has been applied to both free-to-air (55%) and cable services (10%) in Australia for decades, confirmed in the AUSFTA. Australian audiences now mainly use streaming services to watch drama, documentary and children's programs, more than any other platform and their ability to access local content should match the popularity of these services.
No be unreasonably burdensome	Australia has a long precedent for regulating to ensure that our local audiences have access Australian screen culture and that we were not overwhelmed by content from other countries. Mostly global streaming platforms are already investing in Australian screen stories like <i>Boy Swallows Universe</i> and <i>The Clearing</i> because they are globally successful. In 2022-23, they invested \$324.1 million in Australian content.
Be applied only to a service provided by an enterprise that carries on business activities in Australia in relation to the supply of that service	All major streaming services carry on business in Australia because as an English-speaking country, receptive to US culture, we are a highly profitable and low-overhead market for mostly global streaming businesses.

EXPENDITURE VS REVENUE REGULATORY MODEL

SPA has long argued for a revenue-based model of regulation, for reasons of integrity, transparency and administrative simplicity. The arguments in favour of an "expenditure-based" model, as has been applied to cable (Foxtel) is an inferior approach. There is nothing in the AUSFTA that requires us to apply an expenditure model to streaming services, however, it is preferred by them as it can be easily manipulated and lacks accountability.

Expenditure Model	Revenue Model
Opaque – easy to obscure and manipulate	Transparent and readily verifiable from independent sources, ie, ATO
A challenge for a regulator (ACMA) to administer	Simple and straightforward to administer
This approach requires the determination of a streaming service's expenditure on licensing non-Australian content made available in Australia – would they really tell us this and how would we know the figure was accurate or reasonable?	By comparison, revenue is easily defined and determined
No other country in the world with streamer regulation has taken this approach, for good reasons	In adopting a revenue-based approach for Stage 1 of Canada's Online Streaming Regulations, their regulator recently said: The Commission considers that none of the interveners in this proceeding provided compelling evidence that using other criteria would be a significant improvement to a revenue-based threshold. In fact, using any other criteria would make base contribution requirements much more complex. Accordingly, the Commission will use revenues to determine which online undertakings will make base contributions.
Preferred by Big Tech Streamers	Preferred by the Australian Screen Production Industry