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## Screen Producers Australia's submission to the Inquiry into the Australian Government's approach to negotiating trade and investment agreements

### About Screen Producers Australia

Screen Producers Australia (SPA) was formed by the screen industry businesses representing large and small enterprises across a diverse production all forms and formats of screen content.

As the peak industry and trade body, we consult with a membership of more than 700 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and members. Our members employ hundreds of producers, thousands of related industry practitioners and drive over \$2 billion worth of annual production activity from the independent sector.

SPA's members are drawn from all elements of the Australian production ecosystem, including emerging and established producers, production businesses, services and facilities. Our members vary in size from large internationally owned entities, to partnerships, to sole traders and other corporate entities, and are found in every region, state and territory of Australia.

On behalf of these businesses, we are focused on delivering a healthy commercial environment for the entire screen industry through ongoing engagement with elements of the labour force, including directors, writers, actors and crew, as well as with broadcasters, distributors and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

Screen Producers Australia welcomes the opportunity to make a submission to the Joint Standing Committee on Trade and Investment Growth inquiry into the Australian Government's approach to negotiating trade and investment agreements.

For further information about this submission please contact Jane Mulligan, Director of Policy ([jane.mulligan@screenproducers.org.au](mailto:jane.mulligan@screenproducers.org.au))

## EXECUTIVE SUMMARY

- As well as being a successful, exporting industry, the screen industry serves an important function as part of Australia's creative industries in supporting the expression of our national identity and unique culture.
- Australia's audiovisual industries are regulated by the Australian Government to ensure Australian audiences have access to Australian content.
- The audiovisual industry is heavily dependent on technology to create and deliver screen content. Future platforms to deliver screen culture cannot be envisaged today and therefore any international treaty should avoid adopting regulatory measures that might inadvertently have this effect.
- Cultural expression through the provision of Australian film and television programs should not be constrained by bi-lateral agreements with other nations, as is the case with the Australia-US Free Trade Agreement.
- Instead, SPA argues that like other nations with a commitment to the expression of their national culture, Australia should adopt an 'in principle' exemption for cultural industries in any future free trade agreements and avoid constraining future governments in their capacity to develop future regulation.

## BACKGROUND

SPA is pleased to make a submission to the Joint Standing Committee on Trade and Investment Growth inquiry into the approach adopted by the Australian government when negotiating trade and investment agreements with trading partners.

SPA's submission will focus on item (g) in the terms of reference, namely:

*(g) The steps taken to ensure agreements protect and advance Australia's cultural interests;*

As the industry organisation representing a significant proportion of film and television production businesses in Australia, SPA is chiefly concerned with the impact of Free Trade Agreements (FTAs) on the capacity for the Australian Government to effectively regulate audio-visual businesses to reflect the cultural interests of Australian audiences as well as the economic interests of screen-related businesses.

According to the Australian Bureau of Statistics (ABS) recently published *Film, Television and Digital Games Survey* covering the financial year 2021/22, the Australian screen industry employed approximately 55,000 people and contributed over \$6 billion in value-added to the Australian economy in 2021/22. Film and video production businesses overtook subscription broadcasters and channel providers to have the largest total income of \$4,575.3m.

These results show the Australian screen industry is already a significant contributor to the Australian economy, with enormous potential for growth, based on a robust global appetite for screen content, strong international connections through a significant migrant population, an established and highly reputable industry and an internationally valued creative and technically skilled workforce.

## GOVERNMENT INTERVENTIONS IN TV/FILM MARKETS

The Australian screen industry, particularly broadcasting, operates in a regulated market for well-established and sound public policy reasons. With some notable exceptions, this regulation has largely served Australian audiences relatively well.

The Government's policy objective of reflecting Australian identity is set out in the *Broadcasting Services Act 1992* (BSA), which includes the object "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity."

The aim of Australian media content regulations recognises that without regulation, Australian content, particularly more expensive drama, documentary and children's content, would be under-represented as the viewing audiences and markets for Australian content are small, Australian content is expensive to produce, and broadcasters have access to cheaper international content in the English language from the USA and UK.

These content requirements are complemented by a number of other measures to support the provision of Australian content, including funding of the national broadcasters, direct funding to Screen Australia and a range of platform-specific tax rebates, summarised as follows:

- Content requirements under the *Broadcasting Services (Australian Content and Children's Television) Standards 2020* that require commercial TV networks to broadcast at least 250 points of first-release Australian programs each year.
- Regulation of a television subscription licensee (Foxtel) services to ensure 10% of a drama service and channel is spent on new Australian drama, known as the New Eligible Drama Expenditure (NEDE) scheme.
- Tax rebates for Australian content (via the Producer Offset), post, digital and visual effects work (via the Post, Digital and Visual Effects (PDV) Offset), and international footloose productions shot in Australia (via the Location Offset).
- Direct funding to Screen Australia. Screen Australia received \$104,638 million appropriation in 2022-23 to support quality Australian content with cultural value.
- Funding to key institutions such as the Australian Film, Television and Radio School (\$24.283m in 2022-23), and Ausfilm (\$6.9 million over 4 years from 2023–24) to continue to market Australia as a destination for screen production.
- New regulation (announced by the Australian Government but not yet legislated), to ensure that streaming video on demand services invest in Australian programs.

In providing this industry support, Australia joins many other countries around the world that offer various levels of funding and incentives to support their local screen industry and attract international productions to work in their jurisdictions as the benefits, both cultural and economic, as well as trade, tourism and "soft diplomacy" far outweigh the public investment provided. This also supports the truism that "investment in creativity creates its own demand".

## EXEMPTION FOR CULTURAL AND CREATIVE INDUSTRIES

Given the strong history of Australian Government intervention in film and television production, the development of Free Trade Agreements that affect Australia's regulated cultural industries should as far as possible, seek to avoid constraining future government policy in their capacity to adapt to changing technological developments in this sector.

There are a number of sound reasons and precedents to justify the Australian Government adopting an in principle exemption for cultural industries in trade agreements. SPA notes that other countries, including notably, Canada, have for many years supported the principle that trade agreements should provide an exemption for cultural and creative industries and not subject them to bi-lateral trade agreements.

The Canadian exemption for cultural industries covers a broad range of products including books, magazines, periodicals, newspapers, film and video, audio and video music recordings, and radio, cable and television broadcasting. Other countries, such as France, have a narrower focus on the audiovisual industries of television and film production.

Canada's broad exemption for cultural industries is intended to ensure Canada has the capacity "to adopt and maintain programs and policies that support the creation and distribution of Canadian artistic expression or content, without conflicting with trade disciplines included under the terms of the agreement."<sup>1</sup>

This exemption recognises that these industries have an important role in the expression of a nation's cultural identity, as well as being products as part of an industry with an economic and global trade role. Because of this important cultural role, there are strong public interest reasons for an Australian Government to not restrict its capacity to regulate these industries in order that they can act without constraint to meet Australian audience needs.

The need for a cultural exemption is also due to the technologically-based nature of this industry. Australia's cultural industries are heavily based on technology for both development and delivery. Technology is a dynamic input and new technology is driving significant change in how audiences access culture.

How technology may develop and evolve for future audiences cannot be fully anticipated, meaning that policy flexibility is essential to adapt to future delivery platforms. Therefore, making regulations pertaining to an extant industry profile could serve to bind future regulatory action that the Australian Government may wish to make. A cultural exemption would provide future Australian Governments with the flexibility that may be needed to regulate cultural industries in the national interest.

This situation is well described by Patricia Goff in the International Journal of Cultural Policy as follows:

"Cultural policy can serve a variety of objectives, ranging from support for local artists to funding public broadcasting. These policy choices are idiosyncratic, reflecting often

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<sup>1</sup> UNESCO, *Cultural industries exception in Canada's free trade agreements*, 2020, [| Diversity of Cultural Expressions \(unesco.org\)](https://unesco.org)

complex national (and sometimes sub-national or supra-national) values, preferences, philosophical predispositions, historical legacies and domestic politics.

Regardless of the objectives, tried-and-true regulatory approaches that have long served cultural policy goals in a particular place can come under fire, not because they are controversial or ineffective cultural policy tools. Instead, they are assessed by trade policy criteria in the context of trade negotiations. As a result, trading partners can characterize legitimate, favoured cultural policies as protectionist trade strategies and sometimes target them for dismantlement.<sup>2</sup>

SPA is keenly aware that such a situation has materialised as a result of the terms of the Australia-USA Free Trade Agreement (AUSFTA) which in Annexure II includes provisions pertaining to Broadcasting and Audiovisual Services.

Under Annexure II, since 2005, Australian Governments are restricted as to how they can regulate these services. For example, multichannel free-to-air commercial television content is capped at 55% on no more than 2 channels, or 20% of the total number of channels made available by a broadcaster, up to only three channels.

Furthermore, any future Australian Government is only able to revise this restriction down, and if they are reduced in future, they cannot then subsequently return to the original level of 55%.

This clause creates a limitation on regulation for Australian content for subscription television, with requirements for consultation before going beyond 10% to take place “with any affected parties including the United States” up to a maximum of 20%.

As the USA is a major exporter of audiovisual services that dwarfs the Australian screen industry, this clause is of significant advantage to the USA and a restriction on Australian Governments.

## IMPLIED AUSFTA CONSTRAINTS ON REGULATION OF STREAMING PLATFORMS

The role of the AUSFTA in regulation of streaming platforms is a live issue at present for the Australian Government. In January 2023, as part of Australia’s new National Cultural Policy *Revive*, the Minister for the Arts reaffirmed a commitment of the Australian Government to regulate digital streaming platforms to ensure that, like commercial free-to-air broadcasters and subscription cable services (Foxtel), that they too would be regulated so that Australian audiences had access to Australian cultural content across all viewing platforms.

Due to Annexure II of the AUSFTA, the current Australian Government will need to acknowledge these stipulated parameters in order to ensure that Australian audiences have access to Australian content in accordance with government policy objectives. However, it is unwelcome that an Australian Government is put in this position by a foreign government.

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<sup>2</sup> Patricia M. Goff (2019) Trade and culture: the ongoing debate, *International Journal of Cultural Policy*, 25:5, 547-551, <https://doi.org/10.1080/10286632.2019.1626850>

For many years now, screen industry stakeholders (including SPA), has engaged in various rounds of government-led consultations on the regulation of streaming services. Streaming platforms, mostly US-based global businesses, sometimes cite the AUSFTA provisions as a tool that could potentially be deployed to frustrate domestic attempts to pursue regulation.

In SPA's experience, reference to the AUSFTA by global streaming platforms as a has caused SPA to seek and develop legal advice to refute these assertions from time to time as part of engaging with the Australian Government on streaming regulation. SPA understands that because of the operation of Annexure II, the Minister for Trade will be required to maintain a watching brief on future proposals for streaming regulation.

Annexure II therefore, and regrettably, operates in the background as an unnecessary and unwelcome intrusion for the Australian Government in considering any regulation of audiovisual services in the national interest. If an 'in principle' exemption for cultural industries was adopted, the Australian Government would be freed from the need to address this and to more freely regulate for the benefit of Australian audiences, as should be the case.