

Aust-USA FTA, Television and the NBN

Notes of Presentation to Network Insight Seminar Panel “The NBN and TV”

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It's a little odd that one issue that was on the agenda for this afternoon's discussion opens is the question of Australian content. After all, we are used to an environment where the commercial broadcasters must have 55% Australian content for much of the day, where children's content is mandated and 80% of advertisements must be Australian made. Similarly, subscription television must apply 10% of expenditure of drama channels on new Australian content. Putting aside debates over the anti-siphoning regime, Australian content - and Australian drama in particular - has significant regulatory mandate.

Or this appears to be the outcome, until we consider the Australia US Free Trade Agreement (which I refer to as “the FTA” and risk confusion with ‘free to air’ broadcasters). The FTA has changed the way in which Australian content on television can be managed. The operation of the FTA means there is one less ‘lever’ which may be used to regulate Australian television.

[discuss status of FTA and the manner of its implementation – key point is that it is an international agreement which is only accepted into Australian law to the extent that statutory provisions have been enacted that implement permissions or restrictions consisted with it..... So the Broadcasting Services Act is required to be consistent with the FTA, in the sense of not imposing restrictions that are greater than allowed under the FTA, but the BSA can (and does in some cases) enact limitations that are less restrictive than the FTA allows Australia to impose.

So there is a three stage question: (1) what does the FTA allow?; (2) what is the statutory provision? – which is effective and binding regardless of whether it is allowed by the FTA; (3) if the provision is contrary to the FTA, will the US Trade Representative take this up as a trade issue, or would an amendment to the FTA be entertained by Australia and the USA?

Often it is necessary for policy makers to ask a further question: in formulating new regulatory policy, does the FTA impose bounds on what it is possible for Australia to do, without contravening the

FTA? This question arises in relation to the NBN for a number of reasons, relevantly today because it limits Australia's freedom to move on content policy.

The important relevant text is pages 6 and 7 of Annex II (Australia), available at http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html.]

We can already see the flexibility the FTA allows (and the BSA and associated regulatory instruments permits) in relation to free to air television programming on multi-channels by watching Nine's digital multichannel "GO". This popular channel - already out-rating SBS in some timeslots - has great old TV that some of us bought FOXTEL to see time after time. Shows like *Seinfeld*, *I Dream of Jeannie* and *Bewitched* are great entertainment (says Rob Nicholls, not Peter Leonard!). None of those worthy Australian dramas on this channel – and no requirement for Australian content at all.

The FTA limits the obligations which may be imposed in respect of Australian content on commercial free to air television (however delivered) as 55% during day time in respect of two channels, or 20% of channels of a broadcaster, but no more. If there were any doubt, the US FTA further and specifically calls out that no restrictions may apply to more than three channels of an individual service provider.

Today, the commercial broadcasters have the right to air the main channel in each of (1) analog and (2) standard definition digital plus (3) SDTV multichannel and (4) a HDTV multichannel. Arguably, if the service provider offers a main channel in each of analog, SDTV and HDTV, then there can be no Australian content requirements imposed on the SDTV multichannel under the US Free Trade Agreement.

Genre quotas and advertising quotas may be applied proportionately to the main quotas. So Ten can meet its obligations on Australian content and still have an all sports (no children's or drama) programming channel – today on air as One HD.

The world is quite different for subscription television.

For those of us who watch TV1, Hits 111 and Fox Greats, 10% of their spend is already contributing to Australian drama.

Under its Protocol to the FTA, Australia reserves the right to increase the requirement for Australian content spend from 10% to 20%. There is no analogous provision in the Protocol to that effectively restricting the number of channels of commercial free to air television that may be regulated as to Australian content. The absence of such a restriction leaves open the opportunity for further regulation of Pay TV or Pay TV providers, limited only by restriction by genre to arts, children's, documentary, drama, and educational.

So, we have an asymmetric regulatory outcome, and it's potential application in the NBN world does not reflect any reasoned policy intent.

To recapitulate: the last Minister, Senator Helen Coonan, removed the power to grant a new commercial television licence from the ACMA and placed that power in the hands of the Minister of the day. The apparent rationale for this change was that any fight between the commercial broadcasters and someone else about why it might be a bad idea to grant a fourth commercial television licence would be inevitably political in nature, better handled by a Minister of State than the ACMA.

The matter comes into focus in an environment when NBNCo suggests that NBNCo may deliver radiofrequency (RF) services as well as broadband services capable of delivering IPTV.

Free TV Australia have suggested that 'must carry' obligations should be imposed upon NBNCo. Should commercial broadcasters be entitled to demand carriage of free to air television services? Ubiquitous delivery of audiovisual services by the NBN might be a good way of encouraging take up. Certainly, Ed Richards of Ofcom believed that television services are the key to fibre take up - even if his solution was to require Sky to wholesale premium sports channels. On the other hand, the possibility is that free to air television multichannels might be subject to must-carry but subject to minimal Australian content requirements, while Pay TV channels remain subject to the 10% Australian content expenditure requirement in relation to all drama channels.

The issue may be illustrated by considering a hypothetical new entrant broadcaster which wants to deliver a mixed sports, kids

and drama channel. We'll call them HBC. Assume that HBC has acquired some library movie rights, including kids movies, and expects a big audience on the weekend with a package of women's sports. What does HBC do in an NBN world? Well if the NBN is going to offer wholesale access, then HBC could seek access to either the RF path or use an IPTV delivery method. In either case, HBC could choose to become part of a bouquet of services (for example, with FOXTEL or Austar) or to become an independent channel.

HBC probably could not be classified as a narrowcasting service, as movies and women's sport are attractive programming of broad appeal. As a result, unless the current legislation is changed, HBC could not be a free to air commercial television broadcasting service (however delivered) without being individually licensed – and the Minister has not signalled that he will allow a fourth free to air commercial television broadcasting.

Instead, HBC would need to become a subscription television broadcaster. As such HBC would need to spend 10% of its programming expenditure on new Australian drama.

However, if multichannels are deemed as 'must carry' on the NBN, then it may be a cheaper proposition for HBC to pay for the right to form part of a commercial television broadcaster's multichannel bouquet. An odd, US Free Trade Agreement led, outcome.

In the same way that digital dividend policy is not emerging from the Department, there seems to be little policy consideration of television services in an NBN world. If content rules are a guide, there is an extensive amount of work to be done. However, we are sure that the discussion that will flow from this panel will contribute to that work.

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