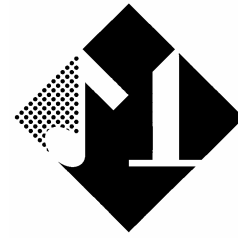


P.O. Box 287
Double Bay NSW 2028, Australia
Telephone +61 (0)2 9251 3816
Facsimile +61 (0)2 9251 3817
Email ozmusico@zeta.org.au
Website: www.mca.org.au
ABN 85 070 619 608

Subscriptions/memberships/accounts
Telephone/facsimile +61 (0)2 9327 4964
Mobile 0414 38 38 48
Email: alisoncole@ozemail.com.au

Music Council of Australia/Freedman Fellowship Program
Telephone +61 (0)2 9380 9903
Facsimile +61 (0)2 9380 8165
Email: sarahhowell@ozemail.com.au

Australia's representative to the International Music Council



Music Council of Australia

Brenton Holmes, Secretary
Senate Select Committee on the Free Trade
Agreement between Australia and the United
States of America
Parliament House, Canberra
April 24 2004

Dear Mr Holmes

RE: THE AUSTRALIA – UNITED STATES FREE TRADE AGREEMENT

- 1 The Music Council of Australia appreciates the opportunity to submit its assessment of the effects of the Australia – United State Free Trade Agreement (FTA).
- 2 The Music Council of Australia is a national peak organisation with a membership of 50, representing national music organisations and various categories of activity across the entire music sector. It is Australia's representative on the International Music Council. It is a source of information, conducts research, is an advocate for music and a manager of projects.
- 3 The Music Council does not believe itself competent to offer an opinion or to take a policy position on the merits of the FTA as a whole. Its observations are entirely about the effects of the FTA on the cultural sector.

Outcomes for Australian culture are almost entirely negative

4 Before negotiation of this FTA, the Australian government's ability to intervene in support of Australian culture was unfettered. From the time of the ratification of the agreement, it will be seriously constrained. Some of the possible effects on Australian culture are clear, others have not been investigated and indeed are unforeseeable.

5 There are no compensating concessions from the USA in the cultural area. To our knowledge, there are no US governmental obstructions to import of Australian cultural product. We do not believe that there were advantages to Australian culture that our negotiators failed to pursue. There simply were none to be had. The difficulties for Australian culture in penetrating the US market are a consequence of its size, self-sufficiency, and obsessively domestic focus. In order to assist entry of Australian product, the US government would have to intervene in favour of Australian producers against US producers. This is hardly likely to occur.

The effects are not immediate

6 Inasmuch as the current regulations for old media are preserved in the AUSFTA, there will be no immediate consequence for culture one way or the other. The effects will manifest themselves into the future as the world changes and the government finds that its flexibility to respond is circumscribed.

7 This presents a challenge to parliamentarians. Since the effects will not be immediate, those making decisions now will not be accountable now. They may or may not be in power when the

chickens come home to roost. We ask that members make their decisions with a statesperson's view of the future.

8 It must be acknowledged also that there is more to Australian culture than is covered by this agreement. On the one hand, this means that aspects of the culture will continue regardless. On the other hand, as will be demonstrated, the structure of the agreement will prevent government regulatory intervention on behalf of those aspects of Australian culture not expressly covered by the agreement.

Initial position of the Australian government

9 The Music Council was among a number of cultural organisations consulted regularly by the Australian negotiators during the negotiating process. We were informed about the position taken by our negotiators as talks progressed.

10 Initially, Australian negotiators sought a *total cultural exemption* from the FTA, on the model negotiated by Australia in its FTA with Singapore, and followed in its offers and responses under GATS. This position was consistent with Australian government statements of cultural policy at international fora for some time before the US negotiations commenced.

11 For instance, the Australian Government acknowledged that "*Market forces alone are rarely sufficient to allow cultural organisations and individuals to be fully self-supporting. This is true for the cultural sector worldwide, but in Australia's demographic and geographic circumstances it is particularly the case... The important mix of subsidy, regulation and tax concessions ... (is) a necessary subvention in the national interest to sustain Australian creative resources...*" (Australian Intervention on Negotiating Proposal on Audiovisual Services, CTS Special Session, Geneva, July 2001)

12 And "*Australia remains committed to preserving our right to regulate audiovisual media to achieve our cultural and social objectives and to maintain the broad matrix of support measures for the audiovisual sector that underpin our cultural policy; including retaining the flexibility to introduce new measures in response to the rapidly changing nature of the sector.*" (*Ibid*)

13 This was a policy supported whole-heartedly by the cultural sector. A lamb chop grown in Australia is much the same as a lamb chop grown in the USA. But the USA cannot create an Australian culture. Only we can do that. Given the realities of the market, aspects of our cultural production can only survive and thrive with government intervention. It is not appropriate that our efforts should be constrained by the trade ambitions of another country.

International support for the exemption of culture from trade agreements

14 There is widespread international support for the total cultural exemption. The International Network for Cultural Policy, a network of cultural ministers from more than 50 countries, made a proposal to UNESCO for an International Convention for Cultural Diversity, a standard-setting instrument which would serve to decide international cultural issues on cultural rather than trade criteria and offer some balance to the trade-orientated agenda of the WTO. UNESCO members have voted overwhelmingly to pursue formulation of such a convention – although with only lukewarm support from Australia despite the fact that at the time, paradoxically, Australia had practised the cultural exemption in its GATS offers and in its FTA with Singapore.

15 The European Union's cultural policies, and those of most of its member states, the policies of the Francophonie, of African states, most American countries north and south, seek to protect their own cultural prerogatives. The opponents, of which the USA is the most obvious, are few in number and generally are net cultural exporters. The US strategy is the aggressive assertion of its position through bilateral trade agreements, forcing concessions for itself in the cultural area to avert its threat of denial of benefits in other areas. This will create a set of precedents that weaken global support for the cultural exemption – for instance, as formulated by UNESCO. Australia is about to join the list of countries to accept unacceptable constraints on its cultural policy making, under pressure from the USA.

Serious effects of a failed consultation process

16 We had meetings with the negotiators in November and then December 2003. In the first of these, we were informed that it was clear that the USA would not accept the proposed total cultural exemption. The Australian negotiators outlined a revision to their position. They would continue to seek a total cultural exemption, but then would make some concessions to the US

demands in the audiovisual area. In a sense, the agreement on culture would be a *positive list agreement*, sitting within a negative list agreement for the FTA overall.

17 The cultural representatives saw no need to concede to the US position nor any compensating cultural benefit from so doing. We were opposed to any weakening of the cultural exemption. However, we agreed that if we must face some concessions to the US, this was an elegant formula. The discussion then focused on the exact nature of the concessions to be offered by Australia.

18 Some of the proposals presented to us by the negotiators at that time were not well received and not supported. For instance, it was made clear to negotiators that a standstill agreement on broadcast quotas was not acceptable, and that much more scope was necessary for the regulation of new media than they proposed. Ratcheting was opposed. The final form of the agreement disregarded many of our warnings.

19 Our next meetings with the negotiators came after completion of the negotiations in January. We were informed that the cultural exemption had been abandoned and we were given an approximate description of the concessions to the USA, which were of the type foreshadowed in December.

20 The December formulation offered a positive list of concessions to the US, outside of which the government's prerogatives to intervene in support of culture were unconstrained. **But the loss of the cultural exemption meant that what had been positive list concessions became the only regulatory rights remaining to the Australian government.** Everything else in the cultural sector becomes subject to the FTA.

21 (It should be acknowledged here that the right to subsidise was retained. It is hardly a right that the US can contest, given its practices in agriculture.)

22 Because this upending of the position on culture occurred only in the final days of negotiations, it was never discussed with the cultural sector. We had never been presented with the need to consider such a policy nor to advise on its effects. The negotiators have offered no evidence that they had considered its possible effects.

23 Indeed, while such an investigation would assist in identifying possible consequences (and some are described below), it is in principle impossible for all the consequences to be anticipated because that would require foreseeing the future through a period of dramatic technological and political change.

24 The Committee will recall the Blue Sky case, brought eventually to the Australian High Court by New Zealand interests under the CER with New Zealand. This was an unforeseen consequence of a negative list agreement. The outcome is that New Zealand film or television productions can be shown on Australian television in satisfaction of Australian local content requirements. Imagine if the litigants had been American, as an unforeseen consequence of the negative list Australia-US FTA!

25 *A principal reason that the FTA is unsatisfactory is that, because it no longer includes a general cultural exemption, it deprives the Australian government of the prerogative to respond through regulation to any cultural circumstance not specifically covered by the language of the agreement. The future is unknown, and as it arrives the government will have lost important rights to regulate in support of Australian culture.*

Australian music quotas for commercial radio

26 Committee members will be aware that reservations from the application of the FTA are found mainly in the Annexes. For the cultural sector they are found primarily in Annex 1 and Annex II.

27 In Annex II is found the reservation for commercial radio broadcast of Australian music—the Australian music quota. A 25% cap is imposed which essentially is a “standstill” on the current quota level.

28 The Music Council, having reluctantly accepted the probability that a cap would be placed on the quota, informed the negotiators that it sought a 60% cap. It had no specific plan to seek a 60% quota, but sought only to retain the right for such a quota to be imposed should circumstances recommend it. It should be noted that a Music Council research project in 2003 demonstrated a correlation between airplay and record sales. Globally, according to statistics released by the International Federation of Phonographic Industries, the average share of

national market for local recordings is 70%. In Australia, the last available figure (2000) was an all time high of 28%.

29 Australia's royalties from export of recordings reached \$71m in 2001, up from \$29m five years earlier (ABS). Again, there was a correlation with increases in the quota.

30 The consequences of the limitations imposed by the AUSFTA are these:

- The government will lose its prerogative to increase the present quota, whatever the arguments in its favour. It should be noted that other countries such as Canada and France have considerably higher quotas.
- The government will lose its prerogative to introduce any other regulations on radio broadcasting that might possibly have been adopted for the benefit of the Australian music sector and the national accounts. There are many other possible formulations – for instance, those operating successfully in other countries -- which might be beneficial here, but will be precluded regardless of merit.
- It might be observed that had the general cultural exemption applied, the effect of the provision in Annex II would have been only to cap the quota, leaving intact the government's prerogatives to introduce other forms of regulation.
- The Music Council did not seek to include other specific regulations because, given the expected general cultural exemption, there was no need. They were not considered by us, and it is fair to assume that the negotiators gave them no thought when striking the deal.

31 The Committee should be aware of the context in which the music quota is imposed. As noted, with passage of the current Broadcasting Services Act, the quota is imposed by self-regulation – but this self-regulation occurs in a context in which the government through the ABA can re-regulate if it so decides, for instance, upon evidence that self-regulation is not achieving the government's policy objectives.

32 The association of radio broadcasters, Commercial Radio Australia (CRA), and its predecessor the Federation of Australian Radio Broadcasters, have been vehemently opposed to Australian music quotas possibly over their entire history since first imposed in 1942, and certainly in recent decades.

33 The Australian recording industry and its main association, ARIA, dominated by the five multinational recording companies, has had little to say on the matter under its current management -- even though, in the past, it was a strong protagonist for the quotas. We understand that ARIA has *not* made a submission to the mandatory review of the quotas now being conducted by CRA. Whatever its stated position at any time, it might be kept in mind that

- The head offices of the five dominant companies in the Australian recording industry are located outside Australia
- Those companies operate globally
- They produce many recordings, only a small percentage of which “chart” with high sales. Charting can be regarded for our purposes as a culling process. Discs with high sales in the USA have a good probability of high sales in Australia.
- All the production costs and most of the costs of the design of market campaigns etc for these discs are incurred outside Australia
- For the Australian branches of these companies to import identified best sellers, along with their proven marketing campaigns, is much cheaper than producing new and untried discs of Australian performers, designing and implementing a marketing campaign, and carrying the costs of the so far uncultured discs that lose money. There is a sort of parallel with the Australian television industry, which can rent an American sitcom for a sixth or less of the cost of producing its own.
- Were not broadcast time reserved for Australian music, thus reserving in a sense a portion of record sales for Australian music (since the relationship between airplay and sales is clearly demonstrable), we might not be able to depend upon the continuing interest of these foreign based companies in recording Australian artists.

34 In summary, the prudent position on regulation in this area would be based on an assumption that for their respective reasons, the broadcasters and possibly the major record companies would withdraw support from Australian music were the quotas to be terminated or weakened. Conversely, the position of Australian music would be strengthened if the quota requirements were (within reason) increased.

Australian music quotas for the community radio sector

35 The reservation covering Australian music on radio does not include the community broadcasting sector, which currently is self-regulated along similar lines to the commercial sector. Because of its genuine commitment to Australian music, its broadcast of a great range of musical styles ignored by the commercial stations, and the exposure it gives to new artists, the community sector is extremely important to us.

36 An important purpose of government in regulating the broadcast sector to include Australian programming, whether of music or audiovisual, is to contribute to the reflection and development of “national identity and character, and cultural diversity”. Commercial radio contributes very little to the reflection and development of cultural diversity; for that, we must depend upon the community and public broadcast sectors and their broadcasts of ethnic and multicultural music, classical music, jazz, folk, country and other styles, and experimental music.

37 If, as the negotiators have claimed, the community broadcasting sector will escape the terms of the FTA because it is not-for-profit and will not be of interest to US interests, no action need be taken. However, we find no basis for this analysis and lacking confirmation, believe that the sector should have been included in Annex II along with the commercial sector.

38 Lacking a general cultural exemption, or its inclusion in Annex II, the government will have no right to regulate the community radio sector for Australian content.

Music on cable television

39 Requirements can continue to be imposed on cable television providers to spend a percentage of income on production of Australian content. Caps are placed on these percentage requirements: 20% for Australian drama, and 10% for a number of other categories such as children’s programs. Music is not included, despite the existence of an Australian cable music channel and the actual or potential inclusion of music programs on other channels.

40 The government should have the prerogative to ensure inclusion of Australian music on channels that program music. However, unlike the situation in other genres where the broadcaster must by necessity take responsibility for production of content, some forms of popular music programming can utilise music content produced by the record companies (in the form of music videos). It may be feasible to have a music broadcast quota rather than an expenditure requirement, for so long as record companies continue to produce audiovisual content. It should be noted, however, that fashion, and music industry practices inevitably change and it may be that the music video goes out of style and is no longer produced. It is conceivable that at some point an expenditure requirement is more appropriate.

41 With passage of the FTA in its present form, and the lack of a general cultural exemption, it will not be possible to regulate for Australian music content on cable television.

Music generally in audiovisual

42 Since music is an element of most audiovisual productions, earning a significant proportion of total income for the sector from neighbouring rights, music participates in the effects of the FTA on the audiovisual sector. These are being dealt with in detail in the submission from the Screen Producers’ Association of Australia, the Australian Writers’ Guild and the Australian Screen Directors’ Association.

Interactive media

43 To the extent that provision is made for Australian cultural content on new media, it comes under the rubric “interactive”. There have been uncertainties about the definition of “interactive” in the new media sector. That could create a problem. There is also uncertainty about other aspects of the title. But it seems that the negotiators have assumed that all of new media will be captured under the title “interactive”. This is a dangerous and probably incorrect assumption. E-cinema, for instance, is neither old media nor interactive. Much of the point of providing a reservation for new media must surely be to preserve the right to regulate media as

yet unconceived. The government once agreed (see para 9 above). Why must they be interactive to qualify?

44 Even overlooking matters of definition, the Annex II reservation for interactive media is critically flawed.

45 There is a requirement to invite "participation" by "any affected parties" in any preparations to change the regulations in interactive media. The US plainly would consider itself an affected party. The negotiators seem to want to obscure this by noting that the requirement will oblige consultation with domestic stake holders. This is as it should be, although if that is the purpose, it does not seem necessary to make such a stipulation in an international trade agreement. The requirement to invite comment from the US is objectionable because in effect, it may translate into a *de facto* requirement for approval by the US.

46 Both Australia and the USA have to agree that Australian audiovisual content or genres thereof are not "readily available" to Australian consumers and that access is not "unreasonably denied". This already invites major differences of opinion. Furthermore, the parties have to agree on *all* of the following: that measures to address such a situation are "based on objective criteria", are the "minimum necessary", are "not more trade restrictive than necessary", are not "unreasonably burdensome". Each of these requirements could be subject to radically different interpretation between two parties, one of which wants to defend its own culture and the other which wants to remove all obstructions to its access to the market.

47 Furthermore, it raises the question of what happens if, having consulted, the Australian government wishes to proceed with regulations with which the US has stated it is in disagreement. Can the US then retaliate (as it has been seen to do elsewhere, and disproportionately)? Is the knowledge that the US is capable of retaliating likely to inhibit the Australian government from placing Australian cultural interests first? Or are they to be constrained *a priori* by the US's view of its own trade priorities?

E-commerce

48 In the e-commerce area, the agreement applies specifically to cultural content except as Australia's rights are detailed in the Annexes. What are the implications for e-commerce activities not now specified in the Annexes? Again, e-cinema is such a genre.

49 In a number of discussions with the negotiators, we were assured that cultural content would be protected in e-commerce by reservations in the Annexes; these would over-ride the stipulations in the e-commerce section. During all of those discussions, it was assumed that there would be a general cultural exemption which would simply remove all cultural content from the e-commerce liberalisation requirements. The purpose of the e-commerce section, we were told, would be more to do with such issues as interoperability. But since there is no cultural exemption, all relevant cultural activities that are not named in the Annexes are subject to the e-commerce provisions. This becomes another area in which the future could bring difficulties and the government may lack the prerogatives to address them.

50 Senator Peter Cook has reported to representatives of the cultural sector at hearings of the Senate Foreign Affairs, Defence and Trade Committee that the US revealed during negotiation of the Uruguay Round its belief that the future of the audiovisual industry lies in the e-commerce area. It is in this area especially that it might have been expected to insist on full liberalisation. It is important to find the loopholes.

Government organisations and qangos

51 The negotiators did not think it was necessary to specify activities of the ABC, SBS and Film Australia as 'non conforming measures', but it is arguable that some, even a large part, of their present activities are provided in competition with private service suppliers and therefore not exempt. The same argument could be extended to other organisations or qangos, existing or to be created, that are active in the cultural area.

Government procurement

52 In the government procurement section, there is a reservation allowing the government to purchase art works without applying national treatment. The implication is that procurement of cultural services or product outside the visual arts is subject to national treatment. We have some concern about this.

Intellectual property

53 The Music Council generally does not object to the terms of the agreement in intellectual property. Especially, it supports the introduction of performers' copyright. On extension of term and some aspects of enforcement, there is mixed opinion.

54 Concerning performers' copyright, under the AUSFTA, this is provided in phonograms; however, it is specifically excluded for performances embodied in audiovisual works. This would include not only films, where the situation is relatively complex, but also in music videos. Chris Creswell from the Attorney-General's Department spoke at the February meeting of cultural representatives with the AUSFTA negotiators. He stated, as we understand it, that legal opinion in Australia held that since music videos utilise sound recordings exactly as released on CD, and then add the visual aspect, that performers' rights should apply to the videos as to the sound recordings. It appears, however, that this consideration has simply been bypassed by AUSFTA.

55 Similarly, the extension of copyright term has been considered at length in Australia, with recommendations failing to find sufficient merit to support it. Negotiators informed cultural representatives a number of times that the government would not support an extension of term. But despite this, in the AUSFTA there is provision for extension of term.

56 We have come to the view that regardless of the merit or demerit of the changes in IPR in AUSFTA, it was not the appropriate place to make these decisions. AUSFTA has displaced or forestalled a more democratic consideration of the issues within Australia and makes our position effectively irreversible regardless of success or failure of the measures, unless the US consents to change. The FTA seems to change Australian law to match US law, possibly more for the benefit of the US than Australia.

International Convention on Cultural Diversity

57 Prior to this FTA, the government was in a position to support the proposed International Convention on Cultural Diversity, now being formulated in UNESCO, on the basis that it already practises what it would be preaching. This convention will provide an international basis for the exclusion of culture from free trade agreements. Our government's position with regard to the convention, should it have wished to support it, now is compromised. This, we believe, is an important aspect of the US agenda to weaken or defeat the Convention.

Conclusion

58 As already stated, the Music Council of Australia does not wish to make a judgement on the FTA as a whole. It accepts that for some sectors the FTA may bring an exchange of benefits.

59 However, given the above considerations, the Council can reach no conclusion other than that the FTA presents serious disadvantages to music and the cultural sector. It cannot endorse this. It does not believe that it would have the support of its constituency in offering sacrifices from the music and cultural sectors in order that other, possibly more financially resilient sectors, might benefit.

60 Indeed, a weakening of the cultural sector represents a contraction of the national spirit and identity. It is the consequence we should least accept from any trade agreement. We seek an expansion of the national spirit.

61 The Music Council therefore does not have a basis upon which to offer support to the Australia – United States Free Trade Agreement.

62 Thank you once again for the opportunity to offer comments on this important agreement.

Sincerely

Dr Richard Letts AM

Executive Director