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The Secretary
Foreign Affairs, Defence and Trade Committee
Department of the Senate
Parliament House
Canberra ACT 2600
By email: fadt.sen@aph.gov.au
June 13, 2014

Dear Sir/Madam

The Music Trust appreciates the opportunity to present this submission on the Korea Australia Free Trade Agreement.

The Music Trust

The Music Trust is a new organisation that “works with energy, imagination and authority to support music in Australia”. Its activities are guided by a distinguished Advisory Council whose members are listed in APPENDIX 2. Its Director is Dr Richard Letts AM who previously made representations to the Commonwealth on international trade agreements as Executive Director of the Music Council of Australia. Ms Lynn Gailey is a member of the Advisory Council and is a close collaborator with Dr Letts in these matters.

General policy position

The Music Trust advocates the application of the “cultural exception” to free trade agreements. APPENDIX 2 lays out the argument. In very brief summary, our belief is that the primary objectives of cultural activity are cultural, not economic. The trade ambitions of other countries should not be permitted to constrain the prerogatives of our government to support Australian culture. Another country may have a comparative advantage in cultural production – by virtue, for instance, of a large domestic market. But Australia cannot pay it to produce Australian cultural services or goods and indeed, aspects of Australian culture may need to be protected from such low price competition.

At the same time, the vitality of Australian culture can be stimulated by an infusion of culture from abroad. Therefore, provided that there is space for Australian cultural production to remain viable and vibrant, The Music Trust supports free entry for cultural production from other countries.

The Music Trust notes with appreciation that the Commonwealth has consistently adopted the cultural exception in the formulation of its position in free trade agreements. Only in CER, inadvertently, and AUSFTA with we understand, reluctance, has it compromised. The formulation of the Commonwealth position is stated clearly and very satisfactorily in the Singapore Australia Free Trade Agreement (SAFTA).

The Korea Australia Free Trade Agreement

The relevant Australian reservations in Annex II under the headings Broadcasting and Audiovisual Services, Advertising Services, and Live Performance, and also under

Recreational, Cultural and Sporting Services, follow closely the reservations in SAFTA. This of course has The Music Trust's support.

We raise two small matters. It is important to the music sector that Australian music is heard on commercial and community radio, both of which are subject to Australian content quotas. In Annex II, such quotas are protected but "audio" is never seen alone but rather, always in the term "audio-visual". We would be alarmed if at some point in the application of KAFTA or other agreements, this became a loophole through which audio, unaccompanied by –visual, were to be excluded from the reservation. We note that in Annex II, Schedule of Korea, the phrase "audio or video" is used. "Audio or audio-visual" would perhaps be preferable. We propose such an amendment in terminology.

The second matter. During the negotiation of AUSFTA, concern was expressed that Australian audio and audio-visual product may not be sufficiently available, or visible, to Australian audiences in online services. We understand that Australian negotiators proposed to the USA that Australia should be able to regulate to ensure that Australian product had satisfactory online "shelf space". We were informed in a DFAT briefing that this proposal had been summarily refused.

It is interesting that the following reservation appears in Annex II, Schedule of Korea, Cross-Border Trade in Services and Investment, Digital Audio or Video Services:

*Korea reserves the right to adopt any measure to ensure that, upon a finding by the Government of Korea that Korean digital audio or video content or genres thereof is not readily available to Korean consumers, access to such content is not unreasonably denied to Korean consumers. With respect to digital audio or video services targeted at Korean consumers, **Korea reserves the right to adopt any measure to promote the availability of such content** (our emphasis).*

The Music Trust proposes that such a reservation be added to the Schedule of Australia in this and all FTAs.

Investor/State Dispute Settlement

The Music Trust is uncomfortable with the inclusion of Investor-State Dispute Settlement provisions. It would be a departure from the former bipartisan commitment to such provisions not being included in free trade agreements. We note that this commitment has not been rigorously applied and in fact, the result of inclusion in the Bilateral Investment Treaty with Hong Kong should be a strong warning against further error since it was used by Phillip Morris in an [unsuccessful] challenge Australia's plain packaging laws for cigarettes.

The Music Trust notes that there is rapid and disruptive change in the cultural sector, especially resulting from the unpredictable developments in digital technologies and their application in the entire chain of cultural creation, production and distribution, with accompanying shifts in the market. The Music Trust cannot point to current threats to the cultural sector through utilisation of ISDS, but the safer road to take is the one that avoids unanticipated consequences.

APPENDIX 1

Culture in the context of international trade agreements

Richard Letts with contributions from Lynn Gailey and Hans Hoegh-Guldberg, June 2014

There are many definitions of “culture”. By “culture”, we mean here our ways of defining and reflecting or expressing Australian life and identity, especially through the arts. Everything we do is an aspect of cultural identity but the arts consciously articulate it.

Artists must eat and therefore there is inevitably an economic aspect to the production of cultural goods and services. Some artists, or the organisations that market their output, are very successful financially.

But we maintain that the primary objective of cultural activity is not financial advantage but the creation of cultural goods or services that satisfy the needs of individuals and the community for a reflection of who we are, a sense of togetherness or belonging, aesthetic or spiritual nurture, a particular type of intellectual exploration, pride in and identification with our artistic achievement and more.

Trade agreements obviously are about seeking economic advantage. There can be economic advantage gained through cultural production. But even were there not, we would persist with cultural production because the motivation is not primarily economic. In Australia, there are thousands of people engaged in cultural production outside the cash economy or even at financial loss to themselves. In many other countries, cultural production is almost totally outside the cash economy but nevertheless vital, alive, important.

In Australia, important aspects of professional cultural production are not financially viable. Their presence in our national life is conditional upon an acquisition of funds or other support, mostly from governments. It was not until governments began subsidising the arts that we developed a sophisticated film industry, theatre, orchestras, dance companies, to some extent literature, on any scale.

In Europe, this role of government is even stronger. In the USA, the government role is weak and the responsibility is assigned to the private sector, with consequences both positive and negative; that is the US culture at work, reminiscent, oddly, of 19C Europe and royal patronage, assumed in the US by the princes of industry.

Some cultural production is commercially viable and indeed can be highly profitable. It will exist whether or not governments intervene. Examples: popular music and music theatre. For instance, popular music and music theatre works mostly fail, but some succeed spectacularly through a combination of the appeal of the work and large financial investment.

As a general rule, governments intervene to make cultural production possible where 1) its *cultural* value is seen as high and 2) it cannot be sustained from earnings (“supply/demand imbalance”).

Supply/demand imbalance

Supply/demand imbalance obviously results from an inability to cover costs from income achieved through box office, sales or fees even when the activity is conducted efficiently. There are various reasons for this in the cultural sphere, each inviting different types of governmental interventions which may be more or less contentious in the international trade arena. We give examples mainly from music, our area of expertise.

- Profitability of the activity requires a larger and/or higher-paying audience than can be achieved even by artistically successful presentations.
 - Symphony orchestras perform some of the greatest music ever composed. But economically they come from the 18-19C, highly labour-intensive, not much aided

by the technological efficiencies possible in most industries, unable to generate enough box office even from audiences of 2,000 per concert to cover costs. A similar situation pertains for large companies in other performing art forms. Survival and the possibility for artistic success and contribution to community are achieved through subsidy.

- Performances of innovative work are typically on a much smaller scale at smaller cost but appeal only to a knowledgeable and committed audience that is too small to pay the costs of the creation and presentation of the art. For the most part, they will not attract the larger, less specialised audience. On the other hand, this is not only a source of vitality today, it is the beginning of the art of tomorrow and so there is great potential advantage in ensuring the activity continues. This also is achieved through subsidy.
- Competition from overseas producers with a comparative economic advantage undercuts Australian producers. While in other spheres, there may be general agreement that comparative advantage rules, in the cultural sphere it can make Australian cultural production financially unviable and so our cultural objective is not achieved. The foreign production is not a substitute. We cannot in essence pay foreign producers to produce Australian culture. Culture needs some protection even in countries that generally support free international trade.
 - Television production. The most successful television drama in Australia is mostly of Australian origin, telling Australian stories, but its production costs are 6 or more times the fee a television network would pay to a US production house to rent existing product to fill the same amount of time. US production costs are completely amortised in the US market and US productions are in essence dumped in other countries. Local Australian production is made possible by government regulation requiring a percentage of broadcast time to be reserved for Australian content. All television stations must meet the requirements and so are on a level playing field. The remaining broadcast time can be used to broadcast content from any source.
It may be worth noting that we gain useful insights into foreign cultures through watching their soap operas, which with no elevated artistic intention show us ordinary lives and cultural assumptions. Similarly, Australian life and beliefs are reflected back to us through our own soap operas. That is their intention. Some series aspire to, and achieve, more.
 - Music broadcast. Commercial radio stations take advantage of success demonstrated internationally mostly by recordings produced in foreign markets and supported often by large foreign marketing budgets. To discover which Australian recordings would be similarly successful, broadcasters themselves would have to test a large number of unproven recordings on the market, a riskier, higher cost process. There is a further commercial disadvantage inasmuch as the Australian recordings are unlikely to have marketing backup on the scale of foreign productions whose popularity has already been demonstrated. In these circumstances, Australian broadcasters will use the easiest, most profitable strategy and on the evidence of their own political advocacy, would give little air time to Australian recordings unless also subjected to a quota system.
The ABC Charter charges it with supporting Australian culture and in music, it does so especially through radio broadcasting. It focuses on genres in which the commercial sector has little interest – classical, jazz, rock and some other contemporary genres but not pop.
 - Film production. Most films, regardless of source, fail; many do not even achieve cinema distribution. An enormous international market exists but international success is usually conditional upon marketing budgets available to foreign producers from especially the USA and the UK, that are often multiples of the

entire production budget of a normal Australian film. Film production is thus high risk and Australian investors are thin on the ground and do not fund massive marketing. Australian films have an important cultural role in telling us our own stories but to the extent they satisfy that objective, may not suit an international market that consumes culturally anonymous action films. Very few Australian films have budgets that might support international success. Most Australian films therefore depend financially upon the small Australian audience.

Governments make production possible through direct investment and through tax incentives.

- Digital creation, production and distribution. All of this is increasingly important. In music, a single person can create a musical work on computer and market and distribute it on the internet. Indeed, in theory the work could be created by insertion of an algorithm into a computer and not be touched by human hands, as it were, until it reaches a listener. (Who, we hope, will not like it!) Musicians, whether Australian or otherwise, are highly unlikely to recover expenses and achieve living costs through the digital distribution of their works; the services such as Spotify that reach the largest audience give astonishingly small remuneration to creators. There is easy access to DIY digital distribution but difficulty in attracting attention. In that difficulty lies the opportunity for major corporations to reassert their dominance. Illegal copying is a problem for audio and audiovisual works. Government intervention so far is especially in revision of copyright law. There has been discussion of regulation of internet service providers but this has been blocked in Australia in the outcome of a case brought against iiNet. There is conflict of opinion on what is appropriate or productive.

Culture and international trade agreements

There are these possible areas of contention:

- **Cultural subsidy.** Governments subsidise cultural production by their own nationals and so other parties to international trade agreement could argue that this confers unfair competitive advantage. So far, Australia has not had to face such an objection. Even the USA, the trading partner least sympathetic to the principle of the “cultural exception” from trade agreements, has offered no challenge. Perhaps it does not want to relinquish its own right to subsidise in the cultural sphere or others; for instance, some US states offer inducements to film producers to meet competition from other states or other countries. Perhaps it thinks there will be a natural limit to the amount of cultural subsidy any government offers (after all, it offers very little) and so this is a fight it doesn’t need to have.
- **Export subsidies.** The Australian government offers export subsidies and also marketing assistance, which is a sort of subsidy. In principle, this is a strategy that could be challenged but continues, presumably because practised also by other countries including the USA.
- **Regulation.** Regulation in support of local culture can be interpreted as limiting market access for trading partners. The broadcast quotas are an example. They reserve a percentage of broadcast time for Australian productions, thereby excluding foreign productions from that portion of the market. Regulation does not require expenditure by the government and so does not confront natural limitations in the way that subsidy does. It also is the natural enemy of “free” trade. Regulation therefore is especially contentious.
- **E-commerce.** E-commerce is a particular arena in which regulation could be applied. The USA is very committed to excluding all regulation of e-commerce from trade agreements. There is an exception for interactive art in the Australia US Free Trade Agreement, instigated by Australia but severely limited in its terms to meet US objections. The future of digital creation, production and distribution cannot be known

and it is important not to enter now into agreements that could limit a productive response in quite different circumstances in the future.

Some special dangers for culture

International trade agreements can prefer the trade ambitions of one country over the cultural needs of its trading partners. Application of the principle of comparative advantage is inappropriate. The fact that one country is a more efficient producer of cultural product does not mean that its products can substitute for those of the home country. Each country should retain its prerogatives to ensure the vitality of its own culture. But on the evidence, the outcome is decided not on a basis of principle but on power.

The vitality of our culture and our people is stimulated also by exposure to the cultural production of other countries. Measures protecting Australian culture should not and do not exclude importation of cultural goods and services from other countries.

When included in trade agreements, culture can find itself traded off as a concession to achieve benefits in other areas of business. There is reason to believe that in the US Free Trade Agreement, cultural prerogatives were ceded by Australia in return for advantage to our agricultural sector. We should not be limiting the scope of our cultural expression for quite unrelated benefits nor indeed, at all.

Another reason for the exclusion of culture from international trade agreements is that once included, it is very difficult to back track. The New Zealand government signed to GATS and thereby undertook not to introduce local content requirements for broadcast music. A later government decided that this had not served the country well and undertook to introduce the quotas. But it transpired that it would face unaffordable financial penalties if it did so, and had to abandon its intention. If the terms of an agreement lead to unforeseen negative consequences for one of the partners, the desire to step back can be blocked by another partner, reinforced in such a general agreement by the threat of retaliation in a non-cultural sector. Better that cultural agreements are negotiated separately.

UN instruments and international trade

United Nations instruments such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration on Cultural Diversity and the Declaration on the Rights of Indigenous Peoples support the rights of people to free cultural expression and to participation in their own culture.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions was created in large part in response to actual and threatened incursion of free trade agreements into governments' rights to support their countries own cultures. The USA was an extremely active opponent and that may well have confirmed nations' perception of the need for the Convention. At the UNESCO General Assembly in 2005, it received 148 votes, with 2 opposed (USA and Israel) and 4 abstentions, one of which was Australia. Australia, however, later became a signatory. The Convention could serve as an international instrument supporting cultural sovereignty. However, its utility in this role has yet to be demonstrated, so far as we know.

Some aspects of Australia's current situation internationally

With the exception of the Closer Economic Relations Agreement with New Zealand and the Australia-United States Free Trade Agreement, it has long been Australian government policy to make no commitments in respect of the cultural sector in positive list agreements, such as the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services, and to secure a comprehensive cultural exception in negative list agreements as in the case with the Singapore Australia Free Trade Agreement - SAFTA.

That exception is stated as a Reservation in ANNEX 4-II(A), AUSTRALIA'S RESERVATIONS TO CHAPTER 7 (TRADE IN SERVICES):

Australia reserves the right to adopt or maintain any measure with respect to:

- the creative arts (1) cultural heritage (2) and other cultural industries, including audiovisual services, entertainment services and libraries, archives, museums and other cultural services;
- broadcasting and audiovisual services, including measures with respect to planning, licensing and spectrum management, and including:
 - . services offered in Australia;
 - . international services originating from Australia.

(1) 'Creative arts' include:

- the performing arts – including theatre, dance and music
- visual arts and craft, literature, film, television, video, radio, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid arts work which uses new technologies to transcend discrete artform divisions.

(2) 'Cultural heritage' includes:

ethnological, archaeological, historical, literary, artistic, scientific or technological moveable or built heritage, including the collections which are documented, preserved and exhibited by museums, galleries, libraries, archives and other heritage collecting institutions.

The Music Trust regards this definition as very satisfactory. It appears to have guided government policy and has been seriously breached only in the FTA with the USA.

Unfortunately, the constraints in that agreement do not govern Australian activities only in relation to the USA but impose limits that apply across the board: caps on broadcast quotas and constraints on regulation around new technologies.

The Productivity Commission in its 2010 Review of Bilateral and Regional Trade Agreements (BRTA) supported the approach adopted in CER with New Zealand - basically the SAFTA approach. It must be noted that CER included a flaw that permitted NZ television productions to be classified as Australian for purpose of meeting broadcast quotas. This did not result in the end of civilisation as we know it – but the trading partner in question was, fortunately, NZ and not the USA.



APPENDIX 2

The Music Trust

Members of the Advisory Council

May 2014

1. Barton, William, didgeridu player
2. Brisbane, Katharine AM, founder and Chair, Currency House
3. Cheetham, Deborah AO, Assoc Dean (Indigenous), Head of the Willin Centre for Indigenous Arts and Cultural Development, Faculty of the VCA and MCA, University of Melbourne; opera singer and composer; member of the Yorta Yorta nation
4. Conyngham, Professor Barry AM, Dean, Faculty of the Victorian College of the Arts and Melbourne Conservatorium of Music, University of Melbourne; composer
5. Ford, Andrew, Presenter, The Music Show, ABC RN; composer, author
6. Gailey, Lynn, former policy officer with MEEA and the Music Council of Australia; expert in international trade agreements, and government regulation of culture
7. Gallasch, Keith, Managing Editor, *Real Time*
8. Hauritz, Bill AM, Founder and Festival Director, Woodford Folk Festival, Executive Director, Queensland Folk Federation Inc
9. Lacey, Genevieve, recorder player, artistic director and serial collaborator
10. Masso, Alex, jazz drummer (The Vampires), instrumental teacher, interests in community music development, career development, industry matters
11. McPherson, Professor Gary, Ormond Chair of Music and Director, Melbourne Conservatorium of Music, University of Melbourne
12. Noonan, Katie, singer – jazz, folk, indie-pop, classical musician; four-time ARIA Award winner; mother, producer, songwriter, pianist, business woman.
13. Peelman, Roland, Artistic Director, The Song Company; Artistic Director, Canberra International Music Festival; conductor
14. Schippers, Prof Huib, Director, Queensland Conservatorium Research Centre, Griffith University
15. Sattler, Graham, Executive Director, Mitchell Conservatorium, Bathurst, NSW, Vice-President, Association of NSW Regional Conservatoriums
16. Schultz, Prof Julianne AM FAHA; Founding Editor, Griffith REVIEW, Griffith University; Chair, Australian Film Television and Radio School, Board Member, Australian Broadcasting Corporation
17. Stefanakis, Mandy, Director of Music, Christ Church Grammar School, South Yarra; consultant to ACARA
18. Tabrett, Leigh, former Deputy Director-General, Arts Queensland; author, *It's Culture, Stupid. Reflections of an Arts Bureaucrat* (Platform Papers, Currency Press).
19. Wilson, Assoc Prof Sarah, Associate Professor & Reader, Melbourne School of Psychological Sciences, The University of Melbourne; Director of Neuropsychological Research, Melbourne Brain Centre, Austin Health
20. Yerbury, Prof Di, former CEO, Australia Council for the Arts, former Vice-Chancellor, Macquarie University, Chair, Board Director or Patron of a wide range of musical performance and music education organisations.

Director of The Music Trust

Richard Letts AM PhD, founder, Music Council of Australia, Past President, International Music Council.