Administration
MBE 148/45 Glenferrie Road
Malvern, Vic 3144
Phone: 03 9507 2315
Fax: 03 9507 2316
Email: admin@mca.org.au
Website: www.mca.org.au
ABN 85 070 619 608
Executive Director
Tel: +61 (0)2 9251 3816
Fax: +61 (0)2 9251 3817
Email: mca@mca.org.au
Music. Play for Life campaign
Tel: 02) 4454 3887 or 0439 022 257
Email: tina.mpfl@mca.org.au
Website: www.musicplayforlife.org
Australia's representative to the International Music Council

Music Council of Australia

Secretary
Regulatory Burdens: Business and Consumer Services
Productivity Commission
regulatoryburdens@pc.gov.au
March 3, 2010

The Music Council of Australia appreciates the opportunity to make this submission to the Productivity Commission's Annual Review of Regulatory Burdens on Business.

The Music Council of Australia is the national peak organization for the music sector. The 50-member Council is comprised of nominees of national music organizations and distinguished individuals elected to positions covering the breadth of this diverse sector. It fulfils its mission through provision of information, research, advocacy and project management. The Music Council of Australia is the Australian affiliate to the International Music Council, based in UNESCO, Paris.

The Music Council notes that this review is part of a five-year cycle of reviews and that this review is the one that covers arts and recreational services.

The Music Council understands that the review is focused on identifying specific areas of Australian Government regulation that are unnecessarily burdensome, complex or redundant or duplicate regulations or the role of regulatory bodies including those in other jurisdictions.

To the greatest extent possible the Music Council will endeavour, in this submission, to confine its comments to Australian Government regulations. However, comment will be made in respect of other jurisdictions because it is the view of the Music Council that the Australian Government has a responsibility to ensure, where necessary, that unnecessary regulations in state and territory jurisdictions are eliminated where possible, utilizing the Council of Australian Government Governments (COAG). COAG has played a useful role in this regard for a number of years. The Music Council is also aware of the role that the Australian Government can play in harmonizing regulations across jurisdictions – the current Productivity Commission review: *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety* being just such an endeavour. The Music Council made a submission to that review and will not now revisit the issues raised therein.

Regulations can act to protect employees, the general public and public infrastructure and are an effective mechanism through which government can give effect to social, cultural and other policy objectives. The starkest example in recent times has been the need for countries to have well regulated financial and banking sectors. Australia has, in part, weathered the global financial crisis successfully and with comparatively little pain because our banking and finance sectors are robustly and appropriately regulated. Occupational, health and safety legislation and regulation is another example, as is local content regulation for broadcasters, discussed below.

The Music Council strongly believes that whilst compliance with regulatory obligations should not impose undue burdens on business, nonetheless such regulatory regulatory regimes as those above are in place to deliver an agreed social good. They may impose a regulatory burden but that is a price paid for living in a just and equitable society. It is agreed that the burden should be minimized through a regulatory design that seeks simplicity and efficiency.

Regulation of Australian content on free-to-air television broadcasting

The Broadcasting Services Act 1992 sets out requirements mandating that Australia's free-to-air commercial television stations shall broadcast specified minimum levels of Australian programs. There is an overall requirement for 55 per cent of the hours between 6am and midnight to be utilised for the broadcasting of Australian programs. Within the overall 55 per cent quota, sub-quotas exist to support those more expensive programming types that in the absence of regulation are unlikely to be broadcast – namely, drama, documentaries and children's programs. A further quota requires 80 per cent of all television commercials to be Australian.

Television first went to air in Australia in 1956 and local content quotas followed soon after in 1961. A specific drama sub-quota was introduced in 1966. Since that time those two quotas have been progressively increased and quotas for children's programs and documentaries introduced. The progressive increase was designed to accommodate both the broadcasters' capacity to commission and/or produce Australian content and the Government's desire that those with access to valuable spectrum recognize such access is attended by obligations that ensure the Government's social and cultural objectives are met.

Australian content quotas have enjoyed bipartisan support since they were first introduced. The Explanatory Memorandum to the Broadcasting Services Act 1992 articulates that policy:

> The rationale for this provision is that it is widely accepted that television is a powerful medium with the potential to influence public opinion and that television has a role to play in promoting Australians' cultural identity … it is intended that commercial television broadcasters broadcast Australian programming which reflects the multi-cultural nature of Australia's population, promotes Australian culture and identity and facilitates the development of a local production industry.

This has changed little from the time then Prime Minister Menzies, recognizing the power of television even when it was in its infancy in Australia, instructed the Australian delegation to the negotiations for the General Agreement on Tariffs and Trade that Australia "would prefer to retain complete freedom of action and not enter into any commitment on the matter".

Regrettably concessions made in the Australia United States Free Trade Agreement (AUSFTA) have constrained Australia's capacity to regulate broadcasting. While the existing quotas can be maintained they cannot be increased and crucially if rolled back are subject to ratchet provisions. The capacity to impose quotas on digital multi-channels is severely constrained and the capacity to do so in new media is dependent on demonstrating to the satisfaction of the USA that Australians have inadequate access to Australian content on new media platforms.

Australia currently imposes a ten per cent expenditure requirement – to be expended on Australian programs – on predominantly drama subscription television channels. With the provisions of the AUSFTA it is possible for that requirement to be increased to 20 per cent and for a ten per cent quota to be imposed on other defined channels, namely arts, children's, documentary and educational programs.

That the Government considers the need to maintain capacity to regulate to support Australian content was brought into sharp relief during the negotiations for the AUSFTA when the United States sought dramatic liberalisation, effectively wanting all local content regulation eliminated. It proved, along with the Pharmaceutical Benefits Scheme, to be one of the most contentious aspects of the negotiations. That Australia insisted on retaining this regulatory right to the extent that it did is evidence of its desire to ensure its ongoing capacity to deliver its cultural and social objectives.

While this form of regulation undoubtedly imposes a financial burden on the broadcasters it is demonstrably an example of regulation existing to deliver a public good. In this case it also recognizes the obligations that accompany access to scarce spectrum. However, it is the public good and the right of Australians to have access to programs that emanate from their own culture that is the bedrock of this form of regulation.

Finally, the fact that the commercial free-to-air broadcasters have throughout the life of the quotas only extremely rarely exceeded the quotas demonstrates that in their absence Australian audiences would be denied meaningful access to Australian content. It is an example of the public good outweighing the impost on business.

Commercial radio content quotas

The first Australian local content standard for music broadcast by commercial radio was introduced as part of the 1942 Broadcasting Act. This stipulated that not less than of 2.5% of music time be devoted to the work of Australian composers. In 1956 it was raised to 5%. In 1973 the Australian Broadcasting Control Board introduced an auxiliary quota for Australian-performed music; this was initially set at 10% and was increased to 20% in 1976. In 1987 the Tribunal conducted a review of the standard, as a result of which amendments were introduced changing the compliance period from 24 hours a day to between 6am and midnight. The 20% level, along with the 1987 amendments, remained the standard until 1992 when the new Broadcasting Services Act made local content quotas part of a self regulatory code for commercial and community broadcasters. Administration of the code was assigned to the industry association for commercial radio broadcasters, now known as Commercial Radio Australia (CRA).

Commercial broadcasters are now covered by a code which nominates a sliding scale of minimum Australian content percentages based on the predominant format of stations and the popularity of the genres they broadcast. At the top of this scale is contemporary popular music which is set at 25% of time assigned to music broadcast, scaling down to jazz at 5%. Compliance with the code is monitored by the Australian Music Performance Committee (AMPCOM), comprised of representatives of the music and commercial broadcasting industries. In 1999 the code was amended to include quotas in certain categories for recordings of Australian performers released in the previous twelve months. Importantly, maintenance of the code is specifically tied to continuing production levels of suitable material for the formats by the record industry.

The fundamental premise for the current Code is articulated in the Broadcasting Services Act of 1992 as being to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity, by prescribing minimum content levels of Australian music.

Prior to the introduction of local content requirements, little Australian music was broadcast on Australian commercial radio. The increasing quota levels over the years have always taken broadcasters beyond their current practices – otherwise there would have been little point. Inspection of recent reports from CRA show general compliance

with the content standards, with few modestly exceeding the quotas and also a few not achieving them.

The Australian recording industry achieved appreciable mass only after introduction of local content quotas. There is no doubt that record sales have been linked to radio broadcast exposure. (See the MCA study of 2003 on the MCA website: http://www.mca.org.au/web/content/view/104/6) At this time, sales of recordings of local artists as a percentage of total sales have actually exceeded the local content level mandated by the Code.

It might be asked whether there is still a need for local content regulations if most stations are complying and sales of recordings by local artists are doing so well. Is this an unnecessary regulatory burden? Could we not trust the broadcasters to continue to broadcast Australian artists?

Two key things might be considered here. Broadcasters must pay a royalty to record companies and artists for the broadcast of Australian recordings – but not for the broadcast of recordings from the USA. There is a financial inducement to avoid those royalty costs, reduce or eliminate broadcasts of Australian artists and shift even more conclusively to the heavily marketed US artists.

Secondly, we could attend to the behaviour of the self-regulating body, CRA. It has continually shown itself hostile to the regulations, not least in 2009 and 2010. CRA is obliged to review Code 4 periodically. It may propose changes and must seek public comment upon them. In 2009 it sought changes that would greatly weaken the Code, by for instance proposing the virtual elimination of the collaborative industry watchdog, AMPCOM, on grounds that the Music Council regards as spurious. It openly revealed its proposals in that regard but attempted covertly to achieve other changes directed to virtually eliminating the crucial “new music” requirement. It has just advertised its desire to remove all local content requirements from digital radio, again justifying this change with arguments that seem totally without substance. In both cases, the announcements of the reviews were made through small newspaper advertisements discovered almost by accident by an industry stakeholder; CRA made no attempt to inform stakeholders of its invitation to comment, even including its supposed colleagues on the oversight body.

The MCA and other industry bodies can provide more detailed evidence of these matters on request.

In summary, we make the following points:

- The activities of CRA give no confidence that local content levels for music will be sustained on commercial radio in the absence of regulation supporting local content
- The absence of substantial local content levels could prejudice the health of the Australian recording industry, already in difficulty due to incursions from the internet
- A weaker recording sector results in less support for Australian artists and less access to their music by Australian and foreign audiences
- While there is a major upheaval and realignment of forces within the music sector resulting from various developments on the internet, and the outcome is unknown, at this time broadcasting is still one of the major points of access by audiences to Australian and other music
- Local content requirements on analogue radio should transfer to digital radio. The requirements should be “platform-neutral”; Code 4 requirements must apply in the same way to both. CRA’s assertion that maintenance of local content regulations will constrain musical diversity of broadcast programs is totally without substance
- A self-regulatory regime requires trust in a level of disengagement and fair play by the regulator. This has been severely challenged in the case of the CRA, which has shown that it is promoting an agenda of deregulation by methods that are less than forthright and with arguments of little substance, raising questions about possible real

but unprofessed motivations including the possibility of a shift to foreign repertoire that requires no performance royalty payments

- The Music Council of Australia proposes that administration of the local content requirements for music on commercial radio should be resumed by the Australian Communications and Media Authority in order to ensure even-handed judgements in the interests of the public good. The public good includes the financial health of the broadcasting industry but also the vitality of the recording industry, the musical artists, public access to their work, and the overall health of Australian culture.

Again, although commercial radio is bound to deliver levels of local content by way of a self-regulating code rather than by way of regulation, it is another instance where the impost on business is greatly outweighed by the public good that such impositions deliver.

Harmonization of state and territory legislation and regulation covering live music venues

As indicated above, and whilst recognizing this inquiry is focused on Australian Government regulation, the Music Council is nonetheless concerned about the complexities businesses face when confronted with the plethora of regulations that a federal system can raise.

For many if not most Australian small to medium businesses, activity is typically geographically constrained.

The issues raised by working across jurisdictions can impose considerable burdens on those where doing so is central to their business. As noted in the Music Council's submission to the Productivity Commission in respect of occupational, health and safety legislation, the music sector has a number of characteristics that distinguish it from many other sectors managing multi-jurisdictional workplaces. Unlike, for instance, the aviation, mining or construction sectors where work in multiple sites in multiple jurisdictions occurs over extended periods of time, the music sector can be in the position of having employees in workplaces for periods of time as little as one day. By way of example, concert and other live performance tours might present performances in, for instance, Sydney, for two days, followed by performances in, say, Brisbane, Melbourne, Adelaide and Perth. Other tours might involve single performances in Sydney, Gosford, Tweed Heads, Coolangatta, Brisbane and Cairns or Port Fairy, Mount Gambier, Adelaide and Port Augusta or Blackheath, Bendigo and Ballarat. For the typically small enterprises that underpin the music industry, coming to terms with differing legislation and regulation across the jurisdictions is unnecessarily complex, unnecessarily burdensome – and simply unnecessary.

The sheer enormity of understanding what is required for compliance is likely to result in non-compliance – hardly the outcome that should be expected from crucial legislation and regulation. By way of example, notwithstanding the National Standard for Occupational Noise, a jurisdiction like New South Wales has a separate code covering noise management – something of which an entity from say Western Australia is likely to be unaware when planning a tour from that state to the eastern seaboard.

The challenges of working in circumstances where the workplace can change from day to day are met by few industries – emergency services, the film and television industry, and news and current affairs being obvious and notable exceptions. The problems for the music sector are exacerbated by the fact that it is identified by micro, small and small-to-medium enterprises, those least equipped to address the complexities raised by cross-jurisdictional inconsistencies.

In 2008, the Music Council undertook an audit of regulations affecting the presentation of live music in venues across Australia. On the next page is a snapshot.

Comparing the States and Territories

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Specific reference in the objects of the Act	N	Y	N	N	Y	N	N	Y
Entertainment venue liquor licence	N	Y	N	Y	Y	N	N	Y
Afforded liquor licences	N	Y	Y	N	Y	Y	Y	N
Order of occupancy, noise & amenity complaints process	N	Y	N	Y	Y	N	N	Y
Minors able to perform	N	Y	N	N	Y	N	N	N
Code of conduct for child employment in entertainment industry	N	Y	N	Y	N	N	Y	N
Demarcation between primary purpose and ancillary use	N	N	N	N	N	N	Y	N
Planning approval for large screens	N	N	N	N	Y	N	N	N
Capital city zoned entertainment precincts	N	Y	N	Y	N	N	Y	Y
Workplace health & safety entertainment industry code of practice	N	N	N	Y	N	N	N	Y
Licensing for agents and managers	N	Y	N	N	N	N	N	N
Code of conduct for agents and managers	N	N	N	Y	N	N	N	N
Deeming provisions for entertainers in workers compensation legislation	N	Y	N	N	Y	N	N	N
Arts funding available under gaming legislation	N	N	N	N	Y	N	N	N
Arts funding available under lotteries legislation	N	N	N	N	N	N	N	Y
Information resources for liquor licensing for venues	N	Y	N	Y	Y	Y	Y	Y
Helpline for building and compliance information	N	N	N	N	Y	N	Y	N
Dedicated publications on building compliance	N	N	N	Y	N	Y	N	Y
Dedicated website on building compliance	N	N	N	N	N	N	Y	N
Building compliance information available from relevant Business Licensing Info. Service	Y	N	Y	Y	Y	Y	Y	Y
Entertainment specific environmental protection publication	Y	N	N	Y	N	N	N	N
Entertainment specific environmental protection website	N	N	N	Y	N	N	N	Y
Adequate reference for agents & managers	N	Y	N	N	N	N	N	N

The Music Council does not believe the answer lies in rolling back regulation across jurisdictions as, in many instances, what is required is the introduction of appropriate regulation. It defies logic for it to be appropriate for only three of eight jurisdictions to feel the need for a Code of Conduct covering child employment in the entertainment industry – there must be appropriate protection for children in all jurisdictions.

The Music Council is currently developing work identifying best practice for the presentation of live music in venues with a view to securing best practice across Australia. However, the Music Council strongly believes there is a role for the Australian Government in steering harmonization across jurisdictions through COAG to

remove what is an unnecessary and particularly burdensome load on micro to medium sized businesses.

Regulation of temporary entry to Australia

Appropriately the Australian Government chooses to manage the way in which Australians have access to world culture. Rather than enable those in the entertainment industry to enter Australia on short-stay business visas, those wishing to present performances in Australia must enter Australia on the relevant visa, namely the Entertainment sub-class 420 visa.

The Migration Regulations set out the circumstances in which applications for this class of visa will be considered. Appropriately, the regulations take account of the Government's objectives in wishing to underpin a viable and vibrant Australian performing arts sector.

Since 2002, successive governments have worked to streamline the way in which such visa applications are considered to maintain the consistently very high integrity of this class of visa whilst accommodating to the greatest degree possible the often short lead times and pressures under which presenters and sponsors often operate.

The current Minister for the Arts is intending to finesse the circumstances under which overseas musicians can undertake live tours in Australia to ensure appropriate opportunities for Australian performers are not in any way undermined. The Music Council supports this intention.

More broadly, the Music Council strongly supports the manner in which entertainment industry visa applications are considered and the Department's ongoing endeavours to streamline applications procedures, especially overcoming difficulties for artists from developing countries.

Thank you again for the opportunity to make this submission. We would be pleased to answer your questions.

Yours sincerely

Dr Richard Letts AM

Executive Director