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Australia's representative to the International Music Council



Music Council of Australia

Review of Trade Agreements Study
Productivity Commission
Canberra City ACT 2601
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September 15, 2010

Dear Sir/Madam

The Music Council of Australia appreciates the opportunity to comment on the Productivity Commission's Draft Research Report, *Bilateral and Regional Trade Agreements*.

The Music Council welcomes the Commission's intention to seek 'further comments from participants in relation to the appropriate treatment of audiovisual services, cultural matters and like national interest issues in future BRTAs' and trusts the following remarks will assist.

The Music Council agrees with the Productivity Commission's recommendation that 'greater recognition should be given to the reasons for seeking to negotiate with a trading partner'. The Music Council considers that some of the preferential trading agreements that Australia has negotiated have been negotiated principally for reasons other than trade. For instance, it can be argued that some of the agreements to which Australia is now a party have delivered little by way of enhanced trading outcomes. With some already negotiated, under negotiation or currently contemplated, strategic, security and other objectives appear to have taken primacy over trade objectives. That being the case, such objectives are better addressed through mechanisms, including by way of bilateral agreements, other than through trade agreements as the Productivity Commission suggests.

The Music Council agrees with the Commission's observation that '[d]omestic economic reform offers relatively large economic benefits and should not be delayed to retain "bargaining coin"'.

A helpful recommendation, supported by the Music Council is contained in Recommendation 6, namely that prior to commencing negotiations with a trading partner:

greater attention should be given to the reasons for seeking to negotiate with a trading partner, the proposed topics for negotiation, potential impacts and benefits of a prospective agreement, expected timeframe, resource requirements, relevant exit strategies where negotiations cannot be concluded within, say, 2 years, and the relative merits and feasibility of alternative strategies, including unilateral and multilateral reform options.

The balance of Recommendation 6 addresses the need to assess the likely benefit to Australia of what has been negotiated in a trade agreement, rather than relying on overly optimistic assessments undertaken ahead of the negotiations. Undertaking an assessment of benefits prior to commencing any negotiations is a sensible part of the consideration process in establishing whether entering into negotiations is a wise use of resources. Crucial is an independent assessment of the impact of the outcome of negotiations, undertaken prior to signature.

Recommendation 4 suggests that the Government 'should adopt a cautious approach to ... exclusions for audiovisual and cultural services'. It is to this recommendation that the Music Council will now address this submission.

As the Music Council said in its earlier submission, excluding the audiovisual and cultural industries from trade agreements has had bipartisan support from the time the General Agreement on Trade and Tariffs (GATT) was negotiated. This remained the case as evidenced by the Australia's Intervention at the CTS Special Session in the General Agreement on Trade and Services (GATS) in Geneva in July 2001:

Australia has long recognised the essential role of creative artists and cultural organisations in reflecting the intrinsic values and characteristics of our society, and is committed to sustaining our cultural policy objectives within the context of multilateral trade agreements.¹

While Australia inadvertently offended this principle in negotiations for the Closer Economic Relations (CER) agreement with New Zealand, it was only with the Australia United States Free Trade Agreement (AUSFTA) that Australia negotiated a position compromising this principle. However, that principle has been respected in subsequent bilateral, regional, plurilateral and multilateral trade agreements, be they concluded, under negotiation or on-going.

The Music Council considers that the position articulated in Geneva, reflected in Australia's GATT and GATS negotiations, and in all trade agreements other than CER and AUSFTA, must continue to be government policy. In other

¹ Australian Intervention on Negotiating Proposal on Audiovisual Services, CTS Special Session, July 2001, Geneva

words, Australia should continue to make no concessions in this regard in all positive listing agreements and negotiate comprehensive exclusions in all negative listing agreements.

As argued in the Music Council's earlier submission, this position is not exclusionary. Australia is one of the most open cultural markets in the world. Rather this position seeks to quarantine a place for Australia's cultural industries to shine within Australia. Importantly, this position allows current and future governments to respond appropriately as circumstances change. Most regrettably, the AUSFTA has seriously compromised Australia's capacity to appropriately support its cultural industries as technologies develop and new delivery platforms emerge.

That Australia is open cultural market is starkly demonstrated by Australia's balance of trade in culture with the countries shown in this chart.

BALANCE OF PAYMENTS
Selected cultural services - Selected countries – 2007-08

	UK	USA	New Zealand	Selected European members of the OECD(a)	Total OECD(b)	Total non-OECD	Total all countries
Theatrical films	-	np	np	-	9	-	9
Television programs	np	np	30	16	82	47	129
Video tapes	1	-	np	-	np	np	5
Other (not separately identified)(c)	np	12	35	3	56	15	71
<i>Total</i>	<i>37</i>	<i>23</i>	<i>70</i>	<i>19</i>	<i>152</i>	<i>63</i>	<i>215</i>
Music royalties	6	36	14	np	np	np	72
Total credits	43	58	84	np	212	75	287
Theatrical films	np	np	-	np	-65	-	-65
Television programs	-70	-339	-	-88	-499	-73	-572
Video tapes	np	-168	-	-80	np	np	-271
Other (not separately identified)(c)	np	-	-	np	np	np	-77
<i>Total</i>	<i>-94</i>	<i>-582</i>	<i>-</i>	<i>-225</i>	<i>-902</i>	<i>-82</i>	<i>-984</i>
Music royalties	-47	-171	-1	-	-219	-8	-227
Total debits	-141	-752	-1	-226	-1 122	-89	-1 211

nil or rounded to zero (including null cells)

np not available for publication but included in totals where applicable, unless otherwise indicated

(a) Includes the Netherlands, Germany, France, Switzerland, Sweden and Ireland.

(b) Includes Canada and Japan.

(c) Includes Multimedia royalties.

Source: ABS, International Trade in Services by Country, 2007-08.

See online at

<http://www.abs.gov.au/ausstats/abs@.nsf/Products/34D585D3A1CE3920CA2576550013DCFC>

Some of the world's largest markets are considerably more closed to overseas cultural goods and services than is Australia. By way of example, UNESCO found that in 2002, where imported music in Australia accounted for more than 80 per cent of the market, imported music in the United Kingdom accounted for only 50 per cent, in Japan 25 per cent and in the United States less than ten per cent².

The chart on page 39 of the UNESCO report shows that the share of the recorded music market taken by imported recordings was greater than in Australia in only two other countries, Malaysia and New Zealand. There is good evidence that even the modest claim of domestic product on the Australian market is only a consequence of the operation of local content quotas on Australian commercial radio.³ While there appears to have been some modest improvement since the date of the UNESCO report, the imbalance appears still to be of the same order.

Australia also maintains a very balanced approach to visas for overseas performers. The Government has long been of the view that Australians have a right to see the output of the diversity of world culture. To that end, over the past three decades state and federal governments have committed considerable resources to assist the mounting of annual festivals to ensure that Australia is able to see a dynamic range of performing arts and music from around the world. Unlike some jurisdictions, for instance, the United States, Australia does not cap or impose annual quotas on overseas performers. In addition to those performers appearing in Australia at 'scheduled' festivals, in 2009 there were some 997 live music tours in Australia by overseas live music performers. This year, to date, there have been 691 overseas live music tours.

Rather the position argued by the Music Council seeks to quarantine a place for Australia's cultural industries to shine within Australia. Importantly, this position allows current and future governments to respond appropriately as circumstances change. Most regrettably, the AUSFTA has seriously compromised Australia's capacity to appropriately support its cultural industries as technologies develop and new delivery platforms emerge.

This position is consistent with the provisions of the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions, to which Australia is a signatory. As the Productivity Commission notes, one of the main objectives of the Convention, articulated in Article 1(h) is:

² UNESCO Institute for Statistics, 2005, *International Flows of Selected Cultural Goods and Services, 1994-2003: Defining and capturing the flows of global cultural trade*, Montreal, p.39, see online at http://www.uis.unesco.org/template/pdf/cscl/IntIFlows_EN.pdf.

³ Paul Mason: *Assessing the impact of Australian music requirements for radio*. Music Council of Australia, 2003. <http://www.mca.org.au/web/content/view/104/6>

to reaffirm the sovereign rights of States to maintain, adopt, and implement policies and measures that they deem appropriate for the protection and promotion of their diversity of cultural expressions on their territory.

In other words, audiovisual and cultural industry policy is considered to be within the gamut of domestic policy.

As the Commonwealth Foundation explains the Convention:

It tackles trade issues within the cultural sector. Asserting the sovereign rights of states to challenge conventional wisdom on trade liberalization by adopting strong cultural policies to protect their cultural expressions, the Convention proposes a new framework of guiding norms which prioritises cultural diversity and human development, while simultaneously appreciating the economic value of the creative industries and cultural sector.⁴

The Convention does not argue for the establishment of trade barriers or restrictions. Rather it argues that governments have an obligation and a sovereign right to support their cultural industries. The Music Council supports this approach and supports the Commonwealth Foundation's contention that culture should be put first in the context of development:

Support for a creative environment, in which cultural expression flourishes and in which people can hear voices from their own cultures, can help to build cohesive societies at ease with themselves.⁵

The Convention is also the basis for promoting international dialogue, axiomatically not trade restrictive, but fostering respect for and understanding of the cultures of others.

The Music Council notes the Productivity Commission's comment in respect of restrictions imposed for cultural reasons, namely that they should be 'genuine and effective, and not a mechanism for simply assisting local producers'. However, the Music Council would like to make the point that supporting cultural industries that the government considers to be producing work that is in the national interest cannot always be easily distinguished from 'simply assisting local producers'. The film industry is a case in point.

In the absence of support for local producers, Australia would not have a film industry today.

The 20th century unfolded with film in its infancy. Cameras had been rolling and footage projected for only six years. Sound tracks were decades away. Australia's ethnographic filmmaking commenced in 1898. The

⁴ Mark Nowottny, *Putting Culture First: Commonwealth perspectives on culture and development*, Commonwealth Foundation, p. 24.

⁵ Mark Nowottny, *Putting Culture First: Commonwealth perspectives on culture and development*, Commonwealth Foundation, p. 9.

Commonwealth Government recognised the potential of cinema immediately and from Federation in 1901 determined to use it in the national interest, commissioning Pathé Frères, the Limelight Department of the Salvation Army, among others, to produce documentaries and record important events.

In 1911, the Government engaged a full-time Commonwealth Government Cinematographer and Stills Photographer with a brief to travel Australia recording anything of interest. Responsibility for the Commonwealth film production was transferred from one department to another until, following World War II, the Australian National Film Board was established, decades later becoming Film Australia, recently merged within Screen Australia.

Various governments sought to foster Australian film production especially after the advent of the 'talkie' in 1928. Usually, like the ill-fated New South Wales' Cinematographic Act (it offended provisions regarding states' rights in the Constitution), these initiatives were implemented in response to the increasing domination of British and American distributors crowding out space on their screens for Australian feature films.

After a promising start, the Australian industry languished after the introduction of 'talkies' at the end of the 1920s, despite some notable box office and critical successes, until the Gorton Government enacted the *Australian Film Development Corporation Act 1970*, providing the first direct subsidy to the film industry and establishing the precursor to today's Screen Australia. In South Australia, Don Dunstan established the South Australian Film Corporation, a model replicated by all state governments.

Notwithstanding the fact that Australia produced the first feature film in the world, it was unable to be home to a viable film industry in the absence of direct and ongoing government support. It did not and does not have the population base to compete in an international market place dominated by English language films in the face of the dominance of initially the United Kingdom and then increasingly and today the United States.

Australia is not unique in this regard. Korea, a nation with a level of industry protection afforded by the fact that English is not its first language, was only able to develop the flourishing film industry it enjoys today because of government regulation.

Korea introduced a screen quota for locally produced films in the 1960s. It remained on the books but unenforced until the 1990s. Once enforced, Korea rapidly built a uniquely successful local film industry in less than ten years. The quota required cinemas to screen locally produced films for no less than 146 days annually. The local industry boomed and by 2005 Korean films were capturing 50 per cent of the Korean box office.

Negotiations for a Korea-United States Bilateral Investment Treaty were suspended in 1999 because the Korean Government refused to repeal its recently enforced screen quota. Unsurprisingly, when the negotiations for a free trade agreement resumed, the screen quota remained contentious. The agreement was eventually concluded in 2007, but only in the wake of the

Korean Government, in the face of enormous local criticism, agreeing to cut the quota from 146 to 73 days annually, effective from July 2006.

Unlike Korea, Australia has never had an enforceable screen quota and, in the face of the dominance of the American industry, Australia's films typically capture four per cent of the box office annually. Like Australia, the Korean Government also supports its cultural industries by way of subsidy. It also sets foreign content quotas for terrestrial, cable and satellite television, radio broadcasting, and Internet Protocol television. Overall, foreign programs may not exceed 20 per cent of terrestrial television or radio broadcast time or 50 per cent of cable or satellite broadcast time measured on a quarterly basis. Annual subquotas restrict broadcast time for foreign films to 75 per cent of all films for terrestrial, cable, and satellite broadcasts; foreign animation to 55 per cent of all animation content for terrestrial broadcast and 65 per cent of all animation content for cable and satellite broadcasts; and popular music to 40 per cent of all music content. A further quarterly quota restricts content from any one country to 60 per cent of the quota available for foreign films, animation, or music.⁶

Today, arguably India is the only country with a viable film industry in the absence of government support, be it by way of quotas, regulation, subsidies or government ownership.

Once the United States was dominant by virtue of a strongly vertically integrated industry, where studios controlled production, distribution and exhibition. Able to cross-collateralise losses and recoup across a slate of productions within their home market, international box office was profit. Today, with burgeoning production budgets, this is no longer the case, with overseas markets being essential if a production slate is to recoup its budget.

These days, American productions forum shop, both at home and internationally, for the best government incentives on offer. Increasingly, American states are offering incentives, many on similar lines to those available in Australia for 'footloose' productions, with many as attractive as the current Producer Offset available for eligible Australian productions – namely a 40 per cent rebate on eligible expenditure.

Around the world, countries have varying levels of support and protection for their own cultural sectors.

Similar to one of the roles of the Australian Communications and Media Authority, one of the functions of the Canadian Radio-television and Telecommunications Commission (CRTC) is to implement the policy objectives of Canada's Broadcasting Act. In accordance with the objectives of the Act, the CRTC is required, among other objectives, 'to safeguard, enrich, and strengthen the cultural, political, social, and economic fabric of Canada'. Canadian free-to-air broadcasters are bound by an overall transmission quota for Canadian productions of 60 per cent, including 50 per cent between 6 pm

⁶ Office of the United States Trade Representative, 2010, *2010 National Trade Estimate Report on Foreign Trade Barriers: Korea*, see online at http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_Korea_final.pdf.

and midnight. 35 per cent of popular musical broadcast on radio must qualify as 'Canadian' under a government-determined point system. More than 50 per cent of cable television and direct-to-home broadcast services received by subscribers must be Canadian programming services.

English and French television networks operated by the Canadian Broadcasting Corporation cannot show popular foreign feature movies between 7 pm and 11 pm, other than those that have been released theatrically more than two years prior to broadcast and excluding any that have been listed in the top 100 of *Variety Magazine's* top grossing films for at least the previous ten years. Non-Canadian channels must be pre-approved by the CRTC.

Canadian content levels vary according to the nature of the services for specialty television and satellite radio services. However Canadian licensees can appeal the listing if a non-Canadian service is thought to be in competition with a Canadian service.⁷

Foreign content in commercials in Malaysia is limited to 20 per cent. 80 per cent of television programming must originate from local production companies owned by ethnic Malays and 60 per cent of radio programming must be of local origin. A condition precedent to obtaining a licence to operate, video rental establishments must have 30 per cent local content in their inventories.⁸

In China, agencies operating under the State Administration for Radio, Film and Television (SARFT) determine the manner in which films can be produced and distributed. SARFT allows only one importer and two distributors to operate within China. Currently, only 20 'revenue-sharing' foreign films are allowed annually, with other imported films allowed entry only under low, fixed-price terms. SARFT also determines the release dates of foreign films. Television quotas limit foreign television drama and feature films to no more than 25 per cent of broadcast time, and the quota for other foreign television programming is 15 per cent. Foreign programming is barred in prime time between 7 pm and 10 pm on terrestrial television. There is a 30 per cent quota for foreign programming on subscription television. The Ministry of Culture's Opinion on the Development and Regulation of Network Music bars foreign ownership of firms supplying digital music services. Entities engaging in online distribution of sound recordings must be wholly Chinese-owned.⁹

⁷ Office of the United States Trade Representative, 2010, *2010 National Trade Estimate Report on Foreign Trade Barriers: Canada*, see online at http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_Canada_final.pdf.

⁸ Office of the United States Trade Representative, 2010, *2010 National Trade Estimate Report on Foreign Trade Barriers: Malaysia*, see online at http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_Malaysia_final.pdf.

⁹ Office of the United States Trade Representative, 2010, *2010 National Trade Estimate Report on Foreign Trade Barriers: China*, see online at http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_China_final.pdf.

In September 2009, Indonesia introduced screen quotas permitting no more than 60 per cent of screen time for foreign films.¹⁰

In December 2009, the implementation deadline for the European Union Directive on Audiovisual Media Services (AVMS) came into effect. The AVMS Directive amended and extended the scope of the Television without Frontiers Directive (covering terrestrial, cable and satellite broadcasting) to cover audiovisual media services provided on-demand, including via the internet. European content quotas for broadcasting remain. The AVMS Directive does not set specific content quotas but requires Member States to ensure on-demand services encourage production of, and access to, European programs.

Many EU Member States maintain specific individual support measures.¹¹

France imposes obligations that exceed the European Union Directive (but approved by the European Commission). Specifically, it imposes a 60 per cent quota for European programming and a 40 per cent quota for French programming on television. Radio broadcast quotas, in effect since 1996, require 40 per cent of songs on almost all French public and commercial radio stations be Francophone. Cinemas must reserve five weeks a quarter for French feature films, reduced to four weeks for cinemas that screen a French short film during six weeks of the preceding quarter. Theatrically released feature films cannot advertise on television.

In July 2009, Italy introduced a quota reserving 50 per cent of monthly programming time for EU programs. Ten per cent of monthly prime time transmissions (20 per cent for RAI) are quarantined for EU works produced during the last five years. Within this quota, 20 per cent is reserved for Italian movies. For telecommunications companies receiving revenue from audiovisual content, investment quotas require five per cent of revenues from audiovisual content be invested in the production and acquisition of EU works.

In Spain, for every three days that a film from a non-EU country is screened, a film from the EU must be screened. The ratio reduces to four where a cinema screens an official Spanish language film at all daily sessions. Spain imposes an annual five per cent expenditure requirement on broadcasters and providers of other audiovisual media services for the production of European and Spanish audiovisual programs.

The examples are many. As indicated above, the only viable audiovisual industry in the world able to flourish in the absence of government – be it federal or state – assistance is the Indian industry. In most instances,

¹⁰ Office of the United States Trade Representative, 2010, *2010 National Trade Estimate Report on Foreign Trade Barriers: Indonesia*, see online at http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_Indonesia_final.pdf.

¹¹ Office of the United States Trade Representative, 2010, *2010 National Trade Estimate Report on Foreign Trade Barriers: European Union*, see online at http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_European_Union_final.pdf.

support can be seen to be 'simply assisting local producers'. That such support exists as widely as it does is because so many governments understand that the audiovisual, arts and cultural industries are subject to many forms of market failure. But more importantly, those same governments understand that to underpin what the Commonwealth recognizes as being the role that the cultural sector plays in building 'cohesive societies at ease with themselves' addressing that market failure is essential.

Thus, consistent with the Convention on Cultural Diversity, consistent with principles articulated by the Commonwealth and, most importantly, consistent with bipartisan support for the recognition of the singular role played in society by our cultural sector, the Music Council urges the Productivity Commission to revisit that part of Recommendation 4 that says the Government 'should adopt a cautious approach to ... exclusions for audiovisual and cultural services'. The Music Council recommends that in its place there should be a recommendation that unequivocally supports exclusions for audiovisual and cultural services in all trade agreements.

As Lyndon Baines Johnson famously said:

In the long history of man, countless empires and nations have come and gone. Those which created no lasting works of art are reduced today to short footnotes in history's catalogue. Art is a nation's most precious heritage, for it is in our works of art that we reveal to ourselves, and to others, the inner vision that guides us as a nation. And where there is no vision, the people perish.¹²

Finally, consistent with the principles articulated above, the Music Council considers that while Australia should not compromise its capacity to regulate or otherwise assist its audiovisual and cultural industries, equally Australia should not ask any other nation state to compromise its own capacity to support its own culture.

Thank you again for the opportunity to make this submission. We are available to respond to any questions.

Yours sincerely

Dr Richard Letts AM
Executive Director

¹² Lyndon Baines Johnson cited by Margaret Seares in 'Small Poppy Syndrome', *The Australian*, May 7, 2001, p. 13.