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*Australia's representative to the International Music Council*



**Music Council of Australia**

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August 25, 2009

Dear Sirs,

**Re: Trans-Pacific Strategic Economic Partnership Agreement**

The Music Council of Australia appreciates the opportunity to comment on Australia's proposed participation in the Trans-Pacific Strategic Economic Partnership Agreement (Trans-Pacific Agreement).

The Music Council has a long standing interest in international trade agreements.

As has been argued by the Music Council in the context of other agreements to which Australia is now party as well as to those still under consideration or currently being negotiated, most recently in respect of the PACER Plus Agreement and the Korea-Australia Free Trade Agreement, the Music Council considers that Australia's international trade objectives are best pursued at a multinational level through the World Trade Organisation through both the General Agreement on Trade and Tariffs (GATT) and the General Agreement on Trade in Services (GATS) and that any agreements to which Australia becomes a party be consistent with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, accession to which has now been recommended by the Joint Standing Committee on Treaties.

Broadly speaking, the Music Council supports multinational agreements over plurilateral and bilateral agreements and supports positive listing agreements over negative listing agreements. The proliferation of plurilateral and bilateral agreements during this decade has been prompted principally by the lack of progress in the current Doha Round. However, the Music Council is increasingly concerned that this proliferation of agreements is likely to result in unintended consequences.

The Music Council understands that the Trans-Pacific Agreement builds on what was formerly known as the Pacific Three Closer Economic Partnership, negotiations for which were launched in 2002 by the President of Chile and the Prime Ministers of New Zealand and Singapore. Brunei Darussalam subsequently joined the negotiations and the Trans-Pacific Strategic Economic Partnership Agreement was agreed in 2005 and ratified and entered into force the following year.

In September 2008, negotiations for the United States of America to join the Trans-Pacific Agreement were announced. Australia, Peru and Vietnam subsequently announced their intention to participate. The Music Council understands that while the first round of negotiations was scheduled for March this year it was subsequently delayed to enable the new administration in the United States to undertake a review of its international trade policy.

Australia already has free trade agreements with all of the parties to the Trans-Pacific Agreement other than Peru.

Australia, New Zealand, Singapore, Vietnam and Brunei Darussalam are all parties to the ASEAN-Australia-New Zealand Free Trade Agreement.

Australia also has bilateral free trade agreements with Singapore – the Singapore-Australia Free Trade Agreement (SAFTA); with the United States – the Australia-United States Free Trade Agreement (AUSFTA); with New Zealand – Australia-New Zealand Closer Economic Relations (CER); and with Chile – the Chile-Australia Free Trade Agreement (CAFTA).

Of these FTAs, like GATS, the ASEAN-Australia-New Zealand FTA is a positive list agreement. The other agreements are negative list agreements.

SAFTA contains a comprehensive cultural carve-out, most importantly, by way of the reservations contained in Schedule 2 of Annex 4 as follows:

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

- the creative arts, cultural heritage 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.<sup>1</sup>

Creative arts are defined as follows:

‘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.<sup>2</sup>

Cultural heritage is defined as follows:

‘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.<sup>3</sup>

The Music Council considers the reservations in respect of Australia’s cultural and audiovisual industries contained in both Schedule I and Schedule II of Annex 4 of SAFTA adequately protect Australia’s arts and cultural industries.

Regrettably, concessions were made in AUSFTA that considerably constrain Australia’s capacity to support its audiovisual industries in the twenty first century, particularly with respect to media platforms that did not exist a decade or so ago. It effectively tried to quarantine Australia’s regulatory capacity to old media.

Unfortunate oversights in the drafting of CER have resulted in New Zealand television programs being afforded national treatment for the purposes of the Australian content standard quotas that apply to free-to-air commercial television.

The Music Council is strongly opposed to any of the concessions made in either CER or AUSFTA being replicated in new trade agreements.

Turning to the Trans-Pacific Agreement, the Music Council notes that “advertising films and recordings” are covered in Chapter 3 – Trade in Goods. The Music Council does not support audiovisual works being treated as goods rather than as services.

Advertising films and recordings are defined as follows:

advertising films and recordings means recorded audio/visual (film, tape or disc), or audio (tape or disc) media designed to advertise or promote goods or services by any company, form or person, having an established business or resident in the territory of a Party, excluding such media for general public exhibition<sup>4</sup>

Article 3.7 – Temporary Admission of Goods – allows for the entry to a party country of advertising films and recordings. However, the Music Council is unclear to what purpose advertising films and recordings could be put if they are excluded from public exhibition.

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<sup>1</sup> SAFTA, Annex 4-II(A) Australia’s Reservations to Chapter 7 (Trade in Services) and Chapter 8 (Investment), see online at [http://www.dfat.gov.au/trade/negotiations/safta/annex\\_4\\_ii\\_a.pdf](http://www.dfat.gov.au/trade/negotiations/safta/annex_4_ii_a.pdf)

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Trans-Pacific Agreement, Chapter 3, Article 3.1, see online at <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/main-agreement.pdf>

The Music Council is concerned that the treatment of audiovisual advertising materials is not treated as a service and is not captured under the Chapter 19 General Exceptions.

Chapter 19, General Exceptions, provides, among other matters for the treatment of the creative arts as follows at Article 19.1.5:

For the purposes of Chapter 12 (*Trade in Services*), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts of national value.

The definition of “creative arts” is very similar, but not the same, as that found in SAFTA, and is as follows:

“Creative arts” include: the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts; and the study and technical development of these art forms and activities.

The Music Council is concerned that support of the creative arts is limited to supporting “creative arts of national value” believing it could result in many of the measures Australia has in place to support its cultural industries being open to challenge under the provisions of the dispute settlement provisions set out in Chapter 15. It should be sufficient that Australia retain the right to support its creative arts in any manner it sees fit and in the absence of having to demonstrate a national value.

Like Australia, both Chile and Brunei Darussalam have local content standards for free to air television, and Australia has local content standards for music on radio. The local content standards were a matter of considerable concern to the United States as demonstrated by the extent to which they sought restrictions on local content standards in digitally delivered audiovisual media. Chile has the capacity to implement a 50 per cent quota and Brunei Darussalam has a 60 per cent quota.

All the proposed participants to the Trans-Pacific Agreement have audiovisual industries that face considerable pressure from the internationally dominant American industry, albeit that very little American programming appears on television in Brunei and, as in Vietnam and Singapore, the media is strongly government controlled..

That being said the Music Council supports the provisions that restrict the scope of the Agreement in regard to government procurement, the provisions excluding services in receipt of government subsidy and the provisions contained in Chapter 10 covering intellectual property.

Thank you for the opportunity to offer these comments. We are of course available for questions or discussion.

Yours sincerely

Dr Richard Letts AM

Executive Director