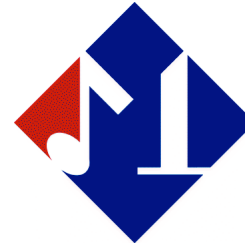


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Australia's representative to the International Music Council



Music Council of Australia

The Secretary
PACER Plus FTA Section
Pacific Regional and New Zealand Branch
Pacific Division
Department of Foreign Affairs and Trade
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July 31, 2009

By email: PACERPlus@dfat.gov.au

Dear Sir,

Re: PACER Plus Free Trade Agreement

The Music Council of Australia appreciates the opportunity to make comment on the proposed PACER Plus Free Trade Agreement.

The Music Council of Australia is the national peak music organisation with a council of 50 representing the broad spectrum of music activities in Australia. The Council has taken a keen interest in the effects of globalisation and international trade on local culture, and has been actively involved in informing and advising government during trade negotiations under the World Trade Organisation (WTO) and in respect of the free trade agreement (FTA) with the United States and other FTAs.

The Australia United States FTA (AUSFTA) has seriously curtailed the Australian Government's prerogative to support Australian culture, especially by way of regulation. As new media and new delivery platforms emerge and become more dominant, the government's freedom to act will be further circumscribed by the very weak reservation in the AUSFTA concerning 'interactive media'.

Australia has made no commitments in the General Agreement on Trade in Services (GATS) in respect of Australia's cultural industries and this continues to be the government's position in negotiations in the current Doha Round.

As the Closer Economic Relations (CER) Agreement with New Zealand, has taught us, the position taken with respect to GATS continues to be the appropriate policy position. Although unaware at the time, the drafting of the CER has had unintended consequences. Following the decision of the High Court, New Zealand television programs must now be treated as eligible television programs for the purposes of the Australian Content Standard for commercial free-to-air television. Although at the time of the High Court decision, the broadcasters stated that there was little interest in broadcasting New Zealand programs, over recent years increasing levels of New Zealand programs have been aired taking up broadcast time that would have otherwise been devoted to Australian originated programs. The impact has been greatest on reality and light entertainment programming and documentaries but last year saw the first drama program displacing what would have otherwise been an Australian drama.

With the CER and the AUSFTA in mind, the Music Council is most concerned that neither become a template for trade agreements under the WTO or with other countries or regions including the proposed PACER Plus FTA. The Music Council is also concerned that the concessions made in these two agreements not be extended to other countries whether in multilateral, plurilateral or bilateral agreements.

Given our past submissions regarding the General Agreement on Trade in Services (GATS) and the AUSFTA, we will not elaborately rehearse again the need to regard culture as not just another good or service to be traded. One of humanity's fundamental needs is to find an identity and a sense of belonging. It is through our culture, above all, that such an identity is articulated – as is recognised in various government documents such as the charters of the ABC and the Australia Council for the Arts and as provided for in the Broadcasting Services Act. Cultural expression and the manner in which it is supported should not be compromised by the provisions of trade agreements.

Consistent with Australia's current position regarding the GATS, in all positive list agreements no commitments should be made regarding the cultural industries and, in all negative list agreements, comprehensive cultural reservations must be negotiated as was the case in the Singapore Australia FTA (SAFTA). The Music Council notes that this was the government's position, prior to negotiation of the AUSFTA, in its dealings with GATS, where no offers have been made in the cultural area, and in the bilateral trade agreement with Singapore where culture was comprehensively excluded in what is a negative list agreement.

In principle, while not objecting to the proposed PACER Plus FTA, the Music Council would strongly recommend it be a positive list agreement, as is the case with GATS and the FTA with Thailand. A positive list agreement will permit much more exact specification of what is offered or, by extrapolation, not offered.

If it is decided to enter into a negative list agreement, culture should be completely excluded with, as indicated above, SAFTA being an appropriate precedent. Under the negative list AUSFTA, no analysis was made of the possible impact on Australia's culture (excepting the audio-visual sector, for which there are some limited reservations). In any case, it is impossible to foresee all of the consequences of these open-ended agreements. To cite once again the experience with the negative list CER, the possibility that New Zealand productions would qualify as Australian content on television was not anticipated. Such an unfortunate unintended consequence would have been much less likely under a positive list agreement.

Furthermore, we cannot now know the future shape and means of culture. We fear that increasingly the Australian government will be precluded by AUSFTA from acting in support of Australian culture on new and emerging delivery platforms.

In supporting the exclusion of culture in PACER Plus it is not intended to imply that cultural productions from Pacific Forum Member countries should be prohibited from Australia. On the contrary, the Music Council believes they should be encouraged.

However, agreements about cultural exchanges or commerce should not be part of international trade agreements because:

- the motivations for the latter are economic rather than cultural and the two are often in conflict
- free trade agreements are effectively irreversible, even when the consequences are deleterious for one of the parties
- such agreements offer opportunities for retaliation in unrelated areas should one of the parties offend.

Consistent with the views of the Music Council that Australia should not make concessions in respect of cultural industries in trade agreements, the Music Council considers Australia should not ask for concessions in respect of cultural industries of other countries, including the Pacific Forum Member countries, notwithstanding any concessions that might have been made in other contexts.

Concessions made by Australia in respect of the AUSFTA and CER should not be treated as precedential nor multilateralised.

Rather all nations should be able to retain the unfettered right to support their own cultural industries in any manner either considers appropriate for their needs and to introduce any such measures at any time.

This position is also consistent with the provisions of 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 Treaties¹.

In the event PACER Plus is to be a negative list agreement, the Music Council believes the agreement must include a broadly drafted exception or reservation covering cultural industries including the audio-visual industry that:

- allows for the introduction of supportive legislation or other form of industry support at any time and in respect of any delivery mechanism now known, in development or that might be invented in the future,
- is technology neutral,
- is self-judging and not subject to dispute,
- is not subject to standstill, snap-back, ratchet or roll-back provisions
- is able to override all provisions in the entirety of the agreement to ensure avoidance of unintended consequences, and
- protects the current restrictions on temporary entry to Australia in the entertainment and cultural industries and allows for amendment to those regulations at any time.

The provisions contained in SAFTA provide a model.

¹ *Report 101: Treaties Tabled on 3 February 2009*, Joint Standing Committee on Treaties, May 2009, Recommendation 1, see online at <http://www.aph.gov.au/house/committee/jsct/3february2009/report1/fullreport.pdf>

The Pacific Agreement on Closer Economic Relations (PACER) was endorsed at a meeting of the Pacific Islands Forum in 2001. It provided for negotiations for a free trade agreement to be initiated by 2011, unless triggered at an earlier date.

The parties to PACER are the members of the Pacific Islands Forum – Australia and New Zealand and 14 Forum Island Countries (FICs), namely: the Cook Islands, Fiji Islands, the Federated States of Micronesia, Kiribati, Nauru, Niue, Papua New Guinea, the Republic of the Marshall Islands, the Republic of Palau, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu.

The Music Council understands that the signing of interim agreements between the European Union, Fiji and Papua New Guinea and the commencement of negotiations between the European Union and FICs have established the trigger for negotiations for PACER Plus to be initiated. It is understood that the commencement of formal negotiations for PACER Plus will be announced at the 40th Pacific Island Forum Leaders Meeting being held in Cairns at the beginning of August.

The Music Council understands that the parties to PACER Plus are to be the same as those party to PACER. Fiji, however, was suspended from the Pacific Islands Forum on 2 May 2009, leaving its status in doubt. The Music Council understands that, notwithstanding pressure from the Melanesian Spearhead Group, Fiji will not be participating in the PACER Plus negotiations at this point in time. The Music Council also understands that New Caledonia and French Polynesia, which became associate members of the Forum in 2006, will not be party to PACER Plus.

Australia, New Zealand, Fiji, Tonga, Papua New Guinea and the Solomon Islands are WTO members. Samoa and Vanuatu moved to join the WTO but subsequently withdrew from the process. Papua New Guinea is the only Pacific Island Forum country to be a member of APEC (Asia Pacific Economic Cooperation).

Under Compacts of Free Association, three countries – the Federated States of Micronesia, the Marshall Islands and Palau – have preferential access for their goods to the United States. The terms of the Compacts have most favoured nations provisions requiring these three countries to extend to the United States any preferences given to third party countries.

Both the Cook Islands and Niue are self-governing parliamentary democracies in free association with New Zealand.

The Pacific Island Countries Trade Agreement (PICTA) was agreed between the 14 Forum Island countries in August 2001 and entered into force in April 2003. As of November 2006, it had been signed by twelve of the 14, with the Marshall Islands and Palau not having signed.² PICTA requires parties to commit to removing tariff on most goods by 2021. However, negotiations commenced last year include trade in services and the movement of natural persons.³

² PICTA Status Report, 2006, Pacific Islands Forum, see online at

http://www.forumsec.org/_resources/article/files/PICTA%20Status%20Report.pdf

³ Pacific Plan Annual Progress Report, 2008, Pacific Islands Forum Secretariat, see online at

http://www.forumsec.org/_resources/article/files/Pacific%20Plan%20Annual%20Report%202008%20-%20web.pdf; *PICTA Trade in Services Negotiations*, Pacific Islands Forum Secretariat, 3 April 2008, see

The Melanesian Spearhead Group (MSG) Trade Agreement was agreed between Papua New Guinea, the Solomon Islands and Vanuatu in 1993 with Fiji joining in 1998. Countries party to this agreement see it as a model for future agreements with Pacific Island countries.

The Music Council recognizes that, other than New Zealand, the countries that will be party to PACER Plus are developing countries with very small economies and, despite their respective long cultural histories, have only fledgling cultural industries.

However, the Music Council is most concerned that with the spaghetti bowl of trade agreements now being negotiated across the Pacific region, and having particular regard to the unintended consequences of CER and the unfortunate commitments made in the AUSFTA, coupled with the fact that two of the FICs are self governing in free association with New Zealand and three have compact agreements with the United States, PACER Plus be negotiated in a manner that quarantines the concessions made in CER and the AUSFTA from PACER Plus.

Given the headlong rush to bilateral and plurilateral agreements in response to the glacial progress being made in the Doha round covering GATS, surprising agreements have been negotiated.

By way of example, where once film co-production treaties were typically negotiated between countries with comparable film industries, working conditions and economies, the United Kingdom has now negotiated a film co-production treaty with Jamaica. Fiji, despite its indigenous film industry being emergent at best, nonetheless offers better film incentives to offshore productions than those available in Australia or New Zealand. That take-up thus far has been low has been due in large part to a lack of skilled technicians and production infrastructure. However, as the history of the Korean film industry has demonstrated, with appropriate government interventions an industry can grow from almost nothing to one capable of capturing more than 50 per cent of local box office within a scant ten years. Whilst this scenario is unlikely to emerge in the Pacific, it was nonetheless the intention of the Fijian Government when introducing its film incentives for offshore productions. And certainly all the FICs must be able to retain the right to support their cultural industries notwithstanding the provisions of free trade agreements.

Finally, the Music Council is aware that movement of natural persons is being considered within the context of PICTA and is to be canvassed in the negotiations for PACER Plus.

The Music Council is also aware of the pilot programs enabling greater access for citizens of certain FICs to work in the Australian agriculture and horticulture industries.

Australia has a well balanced approach to the movement of natural persons in the entertainment industry that enables performers and associated personnel access to the Australian market and allowing Australian audiences access to performances from overseas within Australia. The Music Council supports the current regulations that underpin the movement of creative artists and would not support greater relaxation of the Migration Regulations.

Thank you for the opportunity to make this submission. As always, the Music Council will be pleased to respond to requests for further information or argument.

Yours sincerely,

Dr Richard Letts AM
Executive Director