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Australia's representative to the International Music Council



Music Council of Australia

Trade Commitments Branch
Department of Foreign Affairs and Trade
R.G. Casey Building
John McEwen Crescent
Barton ACT 0221
By email: tpp@dfat.gov.au

Dear Sirs,

Re: Trans-Pacific Partnership Agreement

I write further to the submission made by the Music Council of Australia regarding the Trans-Pacific Partnership Agreement (TPPA) dated 25 August 2009.

At the time the Music Council made the submission in 2009, the Music Council assumed that investor-state dispute mechanisms would not be incorporated in the agreement, as had been the case with the Australia United States Free Trade Agreement (AUSFTA). When the AUSFTA was negotiated, the Australian Government resisted United States' pressure for the agreement to contain investor-state dispute mechanisms in accordance with government policy. Consequently, no mention was made of investor-state dispute mechanisms in our 2009 submission.

However, recent reports in the media regarding the United States' desire to include such provisions in the TPPA have prompted this submission. By way of example, on 15 November 2010, Stephen Long interviewed Lori Wallach, head of the Global Trade Watch Division of Public Citizen in Washington DC for ABC Radio National's *PM* program¹ and, on the same day, Jemima Garrett interviewed Professor Jane Kelsey for Radio Australia's *Pacific Beat* program². Both Professor Kelsey and Lori Wallach raised the current ambition

¹ Long, S. 15 November 2010, "'Trojan Horse' trade deal threatens to undermine consumer protections in Australia" on *PM*, Radio National, ABC, see online at <http://www.abc.net.au/pm/content/2010/s3067027.htm>.

² Garrett, J. 15 November 2010, 'Concerns raised about Trans-Pacific Partnership Agreement' on *Pacific Beat*, Radio Australia, ABC, see online at <http://www.radioaustralia.net.au/pacbeat/stories/201011/s3066983.htm>.

of the United States to remedy what is considered a shortcoming in the AUSFTA by incorporating investor-state dispute resolution mechanisms in the TPPA.

Given the manner in which the lack of investor-state dispute mechanisms was characterized in the United States at the time the AUSFTA was concluded, these recent media reports are concerning.

While the AUSFTA did not include such mechanisms, the door was, however, unfortunately left open for the issue to be revisited. Article 11.16.1 of the AUSFTA allowed for the matter to be revisited in the event "that there has been a change in circumstances"³. Nonetheless, the Music Council welcomed the government's determination to preclude their incorporation within the agreement. At the time, the United States expressed regret about the outcome. The 2004 Report of the Industry Sector Advisory Committee on Services for Trade Policy Matters reported:

Article 21.15 of the Agreement forbids the parties to create private rights of action for nationals of the other party claiming violations of the Agreement by the host government. Thus, the Agreement's protections cannot be used as a basis to challenge Australian governmental action in Australian courts. While a state-to-state process remains available to enforce the investment Chapter, the Committee notes that such processes have rarely been used in investment disputes and is oftentimes a relatively politicised process. Indeed, it was because of the recognised inadequacy of such procedures that the investor-state mechanism was developed over 30 years ago ... the Committee remains extremely disappointed by the Agreement's omission of this integral element of investment protection.⁴

The Music Council, in common with the Australian Government, is opposed to investor-state dispute resolution mechanisms. Further, the Music Council considers reservations in respect of the cultural sector should be self-judging.

In light of the recent media speculation that investor-state dispute mechanisms be incorporated in the TPPA, the Music Council urges the government to maintain the position adopted in respect of the AUSFTA and to oppose their inclusion in the TPPA.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Richard Letts', with a stylized flourish at the end.

Dr Richard Letts AM
Executive Director

³ Australia United States Free Trade Agreement, Article 11.16.1, see online at http://www.dfat.gov.au/fta/usfta/final-text/chapter_11.html.

⁴ Report of the Industry Sector Advisory Committee on Services for Trade Policy Matters (ISAC 13) on The U.S.-Australia Free Trade Agreement to the United States Trade Representative, 12 March 2004, p. 6, see online at http://ustraderep.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Reports/asset_upload_file18_3412.pdf.

